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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

CITY OF SANTA BARBARA,
Petitioner,
VS.
WILLIAMS C. HALL and JEAN G. HALL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a mobilehome park rent regulation constitute either a physical invasion of property or a regulatory taking, even though it does not compel the property owner to open his park to residents and assures the owner of a fair, just and reasonable return?

2. Is a fifth amendment challenge to a rent regulation actionable or ripe for adjudication where the property owner has not sought any rent increases and therefore cannot establish how the ordinance will apply to his property?

3. Should the federal courts revitalize the substantive due process doctrine of *Lochner v. New York* by giving heightened judicial scrutiny to a local regulation of the economic relationship between a landlord and tenant?

LIST OF PARTIES

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	i
Opinions Below	1
Jurisdiction	2
United States Constitutional Provisions and State Statutes and Regulations Involved	2
Statement of the Case	2
a. The Takings Clause	5
b. Substantive Due Process Revived	6
c. Just Compensation	7
Reasons for Granting the Petition	7
I.	
The National Significance of the Opinion Below Justifies this Court's Intervention at this Stage of the Litigation	7
II.	
By Extending the *Loretto* Physical Occupation Theory to a Rent Regulation, the Court Below Has Ignored the Distinction Drawn by this Court Between a Physical Invasion of Property and a Regulation of its Use	9
III.	
By Directing that this Case Proceed to Trial, the Court Below has Disregarded Established Fifth Amendment Pleading Requirements and Relieved the Plaintiffs of their Obligation to Allege Facts Showing an Actionable Constitutional Wrong	12

Page

IV.

The Court of Appeals' Refusal to Require the Plaintiffs to Exhaust their Administrative Remedies Threatens to Inundate the Federal Courts with Premature and Avoidable Challenges to Rent Control Laws 13

V.

The Court of Appeals' Revival of Substantive Due Process Invites the Federal Courts to Second Guess the Legislative Judgments of State and Local Government 14

Conclusion 17

INDEX TO APPENDIX

A. Complaint.

B. Order of Dismissal.

C. Court of Appeal opinion, filed August 22, 1986.

D. Court of Appeal order, filed March 9, 1987.

E. Court of Appeal order denying motion for rehearing, filed March 9, 1987.

F. Mobilehome and Recreational Vehicle Park Conversion Regulations, Santa Barbara Municipal Code Ch. 28.78.

G. California Mobilehome Residency Law, Calif. Civil Code § 798 *et seq.* (selected sections).

TABLE OF AUTHORITIES

Cases

	Page
Birkenfeld v. City of Berkeley, 17 Cal.3d 129, 130 Cal.Rptr. 465, 550 P.2d 1001 (1976)	10
Block v. Hirsh, 256 U.S. 135 (1921)	10
Chicago Board of Realtors v. City of Chicago, 819 F.2d 732 (7th Cir. 1987)	8
Federal Communications Commission v. Florida Power Corporation, ___ U.S. ___, 107 S.Ct. 1107 (1987)	9, 10
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, ___ U.S. ___, 107 S.Ct. 2378 (No. 85-1199, June 25, 1987)	9
Fisher v. City of Berkeley, 37 Cal.3d 644, 209 Cal.Rptr. 682 (1984), aff'd on other grounds, ___ U.S. ___, 106 S.Ct. 1045 (1986)	13
Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875, 104 S.Ct. 218 (1983) (appeal dismissed)	9, 10
Gorieb v. Fox, 274 U.S. 603 (1927)	16
Hutton Park Gardens v. Town Council, 68 N.J. 543, 350 A.2d 65 (1978)	13
Keystone Bituminous Coal Ass'n v. DeBenedictis, ___ U.S. ___, 107 S.Ct. 1232 (1987)	12, 14, 15
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)	5, 7, 8, 9, 10, 11, 12, 14
MacDonald, Sommer & Frates v. Yolo County, ___ U.S. ___, 106 S.Ct. 2561 (1986)	13, 14
Nollan v. California Coastal Commission, ___ U.S. ___ (No. 86-133, June 26, 1987)	15

Table of Authorities

Cases

	Page
Oceanside Mobilehome Ass'n v. City of Oceanside, 157 Cal.App.3d 887, 204 Cal.Rptr. 239 (4th Dist. 1984)	3
Parker v. Fleming, 329 U.S. 531 (1947)	10
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)	11
Troy, Ltd. v. Renna, 727 F.2d 287 (3d Cir. 1984)	10
Williamson Co. Regional Planning Comm'n v. Hamilton Bank, ____ U.S. ____, 105 S.Ct. 3108 (1985)	13
Williamson v. Lee Optical Co., 384 U.S. 483 (1955)	15

Constitution

United States Constitution, Fifth Amendment ..... i, 2, 5, 6, 7, 9, 12, 13, 14, 15

Rule

Federal Rules of Civil Procedure, Rule 12(b)(6) 5

Statutes

California Civil Code, Sec. 798 ..... 2, 3

California Civil Code, Sec. 798.18 10

California Civil Code, Sec. 798.56 7

City of Santa Barbara Municipal Code, Sec. 26.08.040(C)(3) 13, 14

City of Santa Barbara Ordinance, Ord. No. 4269 2

City of Santa Barbara Ordinance, Ord. No. 4275 2

City of Santa Barbara Ordinance, Ord. No. 4285 2

28 U.S.C. Sec. 1254(1) 2

28 U.S.C. Sec. 1331 4

28 U.S.C. Sec. 1343 4

TABLE OF AUTHORITIES

STATUTES

Page

Textbooks

Note, "The Constitutionality of Rent Control Restrictions on Property Owners' Dominion Interests," 100 Harv. L. Rev. 1067 (1987) 8

Moukawsher, "Mobilehome Parks and Connecticut's Regulatory Scheme: A Takings Analysis," 17 Conn. L. Rev. 811 (1985) 3

Baar, "California Rent Controls: Rent Increase Standards and Fair Return," Real Property Law Reporter (Calif. Continuing Educ. of the Bar), Vol. VIII, No. 5, July 1985 .....3, 4, 7

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The City of Santa Barbara ("City"), through its City Attorney, petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. C 1-21) reversing the District Court's dismissal is reported at 797 F.2d 1493 (1986). That opinion was modified by an order (App. D 1) issued March 9, 1987 and reported at 813 F.2d 198 (1987). The court issued an Amended Opinion on March 9, 1987 incorporating the changes made in the order. Also on March 9, 1987, the City's petition for rehearing en banc was denied, with three judges dissenting and filing a separate opinion (App. E 1-7). The

District Court entered its order of dismissal without opinion.

JURISDICTION

The judgment of the court of appeal (App. C 1-21) was entered August 22, 1986. The order denying the City's petition for rehearing en banc was entered March 9, 1987. App. E 1-7. On May 18, 1987, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including August 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

UNITED STATES CONSTITUTIONAL PROVISIONS AND STATE STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> "[N]or shall private property be taken for public use, without just compensation."

The City's "Mobilehome and Recreational Vehicle Park Lease Ordinance" (No. 4285) is reproduced in the appendix (App. A 6-17), as are the "Mobilehome and Permanent Recreational Vehicle Park Conversion Regulations" (Ordinances No. 4269 and 4275) (App. F 1-10). In addition, certain sections of the California Mobilehome Residency Law (Calif. Civ. Code Sec. 798 *et seq.*) are reproduced in the appendix. App. G 1-16.

STATEMENT OF THE CASE

In August, 1984, the Santa Barbara City Council adopted its "Mobilehome and Recreational Vehicle Park Lease Ordinance," Ord. No. 4285 (App. A 6-17) (hereafter the "Ordinance"). The Ordinance regulates the economic relationship between the owner of a mobilehome

park and the park residents, who usually have substantial investments in the mobilehomes located on the space they lease from the owner.[1] The Ordinance requires the owner to offer each resident a ground lease which must include the agreed upon grounds for evicting a resident, a provision governing future rent increases which must be found to be "fair, just and reasonable," an arbitration mechanism to resolve disputes, and a prohibition on the resident assigning the lease. App. A 10-15. The Ordinance also provides for an automatic 10% rent increase when an in-place mobilehome is sold and a new resident moves in. App. A 16.

The stated purpose of the Ordinance is to offer a modicum of protection to mobilehome park residents who are frequently senior citizens on fixed incomes or other persons of limited economic means (App. A 7-8). By placing some restraints on a park owner's ability to unilaterally impose rent increases, while assuring the owner of a fair return, the City Council hoped to reduce the threat of economic devastation faced by park residents who cannot absorb drastic rent increases and yet cannot afford the high price of relocation (assuming a space is available at any price).[2]

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[1]Mobilehome parks are heavily regulated by state law in California and most other states. *See, e.g.*, Calif. Civil Code § 798 *et seq.* (App. G 1-16). A useful survey of those statutes was recently published. Moukawsher, *Mobilehome Parks and Connecticut's Regulatory Scheme: A Takings Analysis*, 17 Conn. L. Rev. 811, 817-19 (1985) (hereafter "Moukawsher").

[2]*See Oceanside Mobilehome Ass'n v. City of Oceanside*, 157 Cal. App. 3d 887, 892-93, 204 Cal. Rptr. 239 (4th Dist. 1984). "In fact, 'mobilehomes' are very immobile because they cost from $5000 to $10,000 to move, vacancy rates in mobilehome parks are extremely low, and many parks will not accept older mobilehomes. Typically, the cost of such homes, when in place in a mobilehome park, ranges from $15,000 to $60,000." Baar, "California Rent Controls: Rent Increase

The Ordinance imposes significantly fewer burdens on the landlord than other rent regulations which have been reviewed and approved by this Court. The Ordinance does *not* compel a property owner to take in a resident against his will; it does *not* prohibit a park owner from changing the use of his park; it does *not* provide for creation of a rent control bureaucracy by the City, and thus keeps governmental involvement in the relations between park owner and resident to a minimum; it allows the owner and resident to waive the Ordinance altogether if they choose some other means of arranging their affairs.

In December, 1984, respondents ("Halls") filed this action against the City in the District Court; it invoked that court's jurisdiction under 28 U.S.C. §§ 1331 and 1343. App. A 1-17. The complaint alleges only *two* nonconclusory facts: the Halls own their park and rent its spaces for residential purposes and the City adopted the Ordinance (App. A 2). The remaining allegations are conclusory and nonfactual, particularly the allegations of paragraph 5 on which the court of appeals' decision was based.

The complaint is conspicuously *silent* on a number of important facts. It does not allege that the Halls have ever sought a rent increase under the Ordinance, nor that they need such an increase to enjoy a fair return. It does not even allege that any of their residents have invoked the Ordinance and asked for leases. It does not allege that the Halls would like to convert their park to another use and have been denied a permit to do so. From the

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Standards and Fair Retu n," *Real Property Law Reporter* (Calif. Continuing Educ. of the Bar), Vol. VIII, No. 5, July 1985, at 1 (hereafter "Baar"). The *amicus curiae* brief of the Golden State Mobilhome Owners League, Inc. offers a vivid picture of the park resident's vulnerability.

complaint, it cannot be ascertained whether the Ordinance applies to the Halls' park at all.

The City moved to dismiss the complaint under F.R.C.P. 12(b)(6). The trial court granted the motion without issuing an opinion. (The Halls did not request an opportunity to amend their complaint.) On appeal by the Halls, the court of appeals reversed on a number of grounds:

a. The Takings Clause.

The court examined the Ordinance using an approach it acknowledged as "novel". By expanding the rule stated in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the court stated that a rent regulation violates the Fifth Amendment if its effect is to permit a "permanent physical occupation" of the landlord's property by the tenant. App. C 8. The court reviewed the Halls' complaint (which it generously characterized as "elliptical") and found that it stated a cause of action under this "physical occupation" theory. The court construed the complaint as including the following allegations:

> "[T]hat the Santa Barbara ordinance has transferred a possessory interest in their land to each of their 71 tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value." App. C 8.

If these claims were proved, according to the court, the Ordinance:

> ". . . oversteps the boundaries of mere regulation and shades into permanent occupation of the property for which compensation is due." App. C 16-17.

The court remanded the takings claim for trial.

b. Substantive Due Process Revived.

The Court of Appeals posed the question: Does the Ordinance "substantially advance a legitimate state interest"? App. C 17-19. In answering this question, the court suggests that a land use regulation which *inadvertently* results in a Fifth Amendment violation is subject to a higher level of scrutiny than one which would apply to a *deliberate* taking of property. With this stricter standard in mind, the court then expressed "significant doubt" as to whether the Ordinance would pass muster. In a revealing footnote, the court cites economic analyses and commentaries criticizing rent control in general, and states:

> "The rationality of rent control *vel non* may have to be reassessed in light of this growing body of thought on the subject." App. C 19.

The three dissenting appeals' court judges characterized this portion of the opinion as embracing renewed judicial activism in examining economic and social legislation, "a view heretofore spurned by the Supreme Court as a tool of constitutional analysis." App. E 6. As the dissenters said:

> "The judiciary does not have the power to sit as a 'superlegislature' second-guessing the wholly economic regulations of state and local governments." App. E 6.

The opinion below directs the District Court to consider the rationality of the Ordinance on remand utilizing the stricter standard of review.

c. Just Compensation.

The last question posed by the court below is whether the Halls received "adequate compensation" for the property which was "taken." Again, the court turns to the test utilized in the *Loretto* physical occupation cases, and expressly rejects the test applied in regulatory cases (i.e., Is the regulated business allowed to earn a fair return?). Using its "novel" test, the court found that rent paid to the Halls for use of their property may be inadequate to compensate them for the possessory interest they have allegedly lost, and remanded the case for trial on this issue. App. C 20.

REASONS FOR GRANTING THE PETITION

I.

The National Significance of the Opinion Below Justifies this Court's Intervention at this Stage of the Litigation.

As pointed out in Part II, *infra*, the Ninth Circuit opinion finds a constitutional infirmity in the Ordinance's limits on the Halls' power to evict residents and select new residents for their 71 spaces. The court does not acknowledge, however, that Santa Barbara's eviction regulations are virtually identical to those imposed by a California statute applicable to each of the 380,000 spaces in the state, whether located in one of the 40 communities which have adopted rent regulations or not. Calif. Civil Code § 798.56, App. G 8-12; *see* Baar, *supra* note 2.

Moreover, according to a recent study, statutes offering some level of protection to residents of mobilehome parks are in effect in at least twenty-two states; at least eighteen states have a statute controlling the grounds upon which a mobilehome park owner may evict a resident. Moukawsher, *supra* note 1.

The opinion below casts a Fifth Amendment shadow on all of those statutes, and is likely to result in significant numbers of cases in the federal district court. Indeed, the rationale of the opinion below is equally applicable to *all* rent regulations whether limited to mobilehome spaces or applicable to apartments.[3] Similar cases are already pending against the communities of Los Angeles, San Jose, Westlake Village, Morro Bay and Scotts Valley,[4] and the Ninth Circuit theory appears to be gaining some currency in other circuits even though it is inconsistent with the latest Fifth Amendment cases from this Court. *See Chicago Board of Realtors v. City of Chicago,* 819 F.2d 732 (7th Cir. 1987) (concurring opinion of Posner, J.).

It is necessary for this Court to review the opinion below at *this* stage of the litigation — and to guide the lower courts regarding the proper limits of *Loretto* and of the appropriate role of the federal courts in overseeing the legislative determinations of local government — in order to avoid the substantial expenditure of public resources which will occur as these expensive cases come to trial one by one and work their way up the appellate ladder. Moreover, even if the Halls' case against Santa Barbara fails at trial, the precedential effect of the Ninth

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[3]"[T]he *Hall* court, focusing on the infringement of the right to exclude, expanded the concept of 'physical invasion' to include a regulation indistinguishable from other eviction controls." Note, "The Constitutionality of Rent Control Restrictions on Property Owners' Dominion Interests," 100 Harv. L. Rev. 1067, 1075 (1987).

[4]*Azul Pacifico, Inc. v. City of Los Angeles*, U.S.D.C. No. 87-02287 (C.D. Cal.); *Beaumont Investments, Ltd. v. City of San Jose*, Santa Clara Superior Court No. 627047; *Oak Forest Mobile Estates, Ltd. v. City of Westlake Village*, U.S.D.C. No. 85-2861 CBM (C.D. Cal.); *Jennings v. City of Morro Bay*, U.S.D.C. No. 87-02435 (C.D. Cal.); *Rooke v. City of Scotts Valley*, U.S.D.C. No. C 86-29811 WAI (N.D. Cal.).

Circuit's erroneous expansion of *Loretto* will be felt in the western states and elsewhere for many years.

Finally, the state and local governments facing *Hall*-type challenges now and in the future must contend with another new reality: if a regulation is found to violate the Fifth Amendment, damages may be awarded the property owner for the period of time the law was in effect. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, ____ U.S. ____, 107 S.Ct. 2378 (No. 85-1199, June 25, 1987). While this case is pending, the damages for a taking for which the City may be liable are accumulating. If this Court agrees with the Ninth Circuit that *Loretto* can logically be extended to an ordinance regulating the economic relationship between landlord and tenant, or that heightened scrutiny is appropriate in such a case, much waste of both public and private resources would be avoided by learning of that conclusion now, rather than after a lengthy trial and intermediate appeals.

II.

By Extending the *Loretto* Physical Occupation Theory to a Rent Regulation, the Court Below Has Ignored the Distinction Drawn by this Court Between a Physical Invasion of Property and a Regulation of its Use.

The crux of the opinion below is its holding that:

> "When viewed in the light most favorable to the Halls, the allegations of the complaint seem to present a claim for taking by physical occupation, as in *Loretto*, *Kaiser-Aetna* and their precursors." App. C 8.

This conclusion rests upon a broadening of the *Loretto* rule in a manner inconsistent with *Loretto* and later cases, particularly *Federal Communications Commission v. Florida Power Corporation*, ____ U.S. ____, 107 S.Ct. 1107

(1987) and *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 104 S.Ct. 218 (1983) (appeal dismissed). It also conflicts with the opinion of the Third Circuit. *Troy, Ltd. v. Renna*, 727 F.2d 287 (3d Cir. 1984).

The opinion below found that *Loretto* applies due to the fact that the Ordinance places restrictions on a landlord's ability to evict a resident; the court characterized these limits as giving the residents "the right to occupy property in perpetuity." App. C 8. This conclusion is unsupported by both fact and law for a number of reasons. First, the Ordinance on its face permits a landlord to evict a resident during the term of a lease on the same grounds found in rent control ordinances previously approved by this Court. *See, e.g., Block v. Hirsh*, 256 U.S. 135 (1921) (war time rent and eviction controls in the District of Columbia); *Parker v. Fleming*, 329 U.S. 531 (1947) (eviction controls as part of the Emergency Price Control Act of 1942).[5] Second, the Halls have the right to stop leasing their property altogether. Like the Florida Power Corporation (*FCC, supra*), the Halls have the ability to stop being a landlord.[6] Third, under state law any lease offered by the Halls must contain a stated term. Calif. Civil Code. § 798.18, App. G 5, 7.[7]

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[5]In the cited cases, this Court has recognized that eviction restrictions are a critical element of rent regulation, which would be ineffectual if the landlord could evict without cause and rent to a new tenant at a higher rate. *C.f. Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001 (1976).

[6]The Halls do not allege in their complaint that they cannot change the use of their property from a park under the City's conversion ordinance. App. A 1-4.

[7]The court below apparently did not consider the effect of this state statute in reaching its view that the residents of a mobilehome park have a "perpetual" right of occupancy under the Ordinance. App. C 8, 9. Certainly, the fact that the Ordinance places limits on a park

Perhaps most importantly, unlike the New York statute in *Loretto*, the Ordinance does not authorize the government or a third party to physically occupy the property without the owner's consent; it merely regulates the economics of a commercial relationship established at the property owner's initiation. Like the Florida Power Corporation, the Halls voluntarily opened their property to their residents. *FCC, supra,* 107 S.Ct. at 1112 ("... [I]t is the invitation, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license."); *C.f. PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

The opinion below rejected these arguments:

> "In none of the cited cases has the landlord claimed that the tenant's right to possess the property at reduced rental rates was transferable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others." App. C 1-14.[8]

The court finds a constitutional fault in an economic regulation which shifts an economic benefit from one private party to another. In Santa Barbara, according to

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owner's ability to evict cannot be said to have conferred such a "perpetual" right of occupancy on the park residents; as pointed out in the text, all rent regulation systems include eviction controls as a necessary element.

[8]The court below merely notes, but does not take account of, the Ordinance provision allowing an automatic 10% rent increase when a tenant moves out. App. D 1. (The rent control ordinances previously approved by this court did not include a similar provision favoring the landlord.) Thus, a mobilehome sale in Santa Barbara confers a benefit on the park owner in the form of higher rent. If, as the court suggests, a sale creates a "windfall" in favor of the selling tenant, it is at least a shared windfall with a portion going to the landlord.

the Halls, a mobilehome owner "reaps a windfall" by selling his rent-controlled mobilehome for a premium. Yet, this "windfall" appears indistinguishable from the economic benefit enjoyed by a cable company which is allowed to lease space on a power pole for $1.79 rather than $7.15 (*FCC, supra*) or the benefit enjoyed by an apartment tenant paying $300 per month under rent control rather than $350 (*Block*). All price controls necessarily shift money from one private pocket to another. This Court has never held that such an economic impact, *by itself*, constitutes a physical occupation of property.

Further, the analysis by the court below errs in treating a landlord's right to evict as a separate property interest independent of the other "strands" in the "bundle" of property rights, and improperly directs the trial court to focus on the extent of loss of that one strand. This mode of analysis has been repeatedly disapproved by this Court. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, ___ U.S. ___, 107 S.Ct. 1232, 1248-49 (1987).

It thus appears that there is no factual nor doctrinal basis for the conclusion of the court below that *Loretto* can be extended to rent control ordinances. This Court should grant the petition to correct this error.

III.

By Directing that this Case Proceed to Trial, the Court Below has Disregarded Established Fifth Amendment Pleading Requirements and Relieved the Plaintiffs of their Obligation to Allege Facts Showing an Actionable Constitutional Wrong.

The Ordinance on its face states that rent increases must be "fair, just and reasonable." App. A 13. The complaint does not allege that this requirement has not been satisfied; indeed, the complaint is wholly silent on

the fair return question. Under these circumstances, the trial court was justified in dismissing the complaint on the ground that the Ordinance, on its face, satisfies the constitutional standard which requires price regulations to afford the regulated business with a just and reasonable return. *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 209 Cal. Rptr. 682 (1984), *aff'd on other grounds*, ____ U.S. ____, 106 S.Ct. 1045 (1986); *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 350 A.2d 65 (1978).

IV.

The Court of Appeals' Refusal to Require the Plaintiffs to Exhaust their Administrative Remedies Threatens to Inundate the Federal Courts with Premature and Avoidable Challenges to Rent Control Laws.

This Court has made it clear to the lower courts that a Fifth Amendment challenge to a local property regulation — whether on its face or as applied — should not be heard until the courts can ascertain exactly how the regulation affects the property owner, since a "taking" allegation cannot be assessed until the extent of the impact has been measured. *See MacDonald, Sommer & Frates v. Yolo County*, ____ U.S. ____, 106 S.Ct. 2561, 2567 (1986); *Williamson Co. Regional Planning Comm'n v. Hamilton Bank*, ____ U.S. ____, 105 S.Ct. 3108, 3116-17 (1985).

The opinion below attempted to address this argument by asserting that there is no administrative process for a mobilehome park owner to pursue in order to obtain relief from the provisions of the Ordinance which the court found to be unconstitutionally onerous. App. C 20-21, n.28. However, the Ordinance on its face provides that a park owner may seek a special rent increase above and beyond the automatic rent increase provided for in the ordinance when a tenant moves out. (Municipal Code

§ 26.08.040(C)(3)). There is no allegation in the complaint that the plaintiffs ever sought and were denied such a rent increase. *See Keystone, supra,* at 1247-48.

By seeking a rent increase, the Halls could avoid any injury which they claim is caused by the Ordinance. In the absence of a decision on a rent increase request, it is impossible to ascertain the extent to which the Ordinance has economically impacted them. Without an assessment of that impact, a meaningful Fifth Amendment analysis is infeasible. *See MacDonald, Sommer & Frates, supra.*

V.

The Court of Appeals' Revival of Substantive Due Process Invites the Federal Courts to Second Guess the Legislative Judgments of State and Local Government.

The Ninth Circuit panel directs the District Court on remand to ask: "Did the Ordinance Substantially Advance a Legitimate State Interest?" App. C 17. The panel seems to instruct the trial court *not* to apply the traditional standard invoked when the judiciary reviews economic or social legislation. Rather, the court suggests in somewhat elliptical terms that less judicial deference is to be afforded a regulation like Santa Barbara's since it is claimed that the Fifth Amendment has been violated.[9] Further, the court indicates that the trial court is to examine the Ordinance based on economists' assessments of its practical effectiveness rather than the court's as-

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[9]This aspect of the decision below is inconsistent with the court's other holding that *Loretto* applies. As this Court stated in *Loretto*, where a permanent physical occupation of the property occurs due to governmental action, a taking has occurred "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." (*Id.*, 458 U.S. at 434-35).

sessment of its legal consequences. Finally, the court starts to answer its own question by expressing its "significant doubt" that the Ordinance can be found to be rational.[10]

While it may appear at first that this aspect of the opinion below may have presaged this Court's ruling in *Nollan v. California Coastal Commission*, ____ U.S. ____ (No. 86-133, June 26, 1987), a closer examination shows that in fact the opinion applies the *Nollan* principle in a way which neither *Nollan* nor earlier cases justify. According to the *Nollan* majority opinion, a heightened level of judicial scrutiny is warranted in at least some Fifth Amendment cases where the government is compelling an "actual conveyance of property" and therefore may be seeking to avoid a compensation requirement. *Nollan, supra,* slip op. at 15. This rationale is inapplicable to Santa Barbara's ordinance, which merely restricts the rent which the Halls can charge and concurrently imposes eviction limitations which are essential to the rent regulation system. Santa Barbara's Ordinance is within that class of enactments which adjust "the benefits and burdens of economic life to promote the common good." *Keystone, supra,* 107 S.Ct. at 1244 n.18.

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[10]The "significant doubt" expressed by the court below regarding the Ordinance's constitutionality is based on the court's perception that the ordinance does not help to provide affordable housing since, as the court notes, the sales prices of mobilehomes in the Halls' park are not similarly controlled and could increase by an amount which more than offsets the rent savings a future tenant will experience under the Ordinance. App. C 18-19. In other words, the court believes that the ordinance does not go far enough in controlling price and is therefore constitutionally suspect. This Court has never held that a legislature's decision not to regulate every aspect of a business disables it from regulating a portion of the enterprise. *Williamson v. Lee Optical Co.*, 384 U.S. 483 (1955).

The City respectfully submits that the appellate court's suggestion to the trial court to employ a stricter standard of review is inconsistent with a long line of decisions from this Court, the earliest of which recognize the proper role of the courts in reviewing local land use regulations:

> "Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (citations omitted).

CONCLUSION

The City respectfully asks this Court to grant the petition.

Respectfully submitted,

STEVEN A. AMERIKANER
City Attorney
Counsel for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 84-9506-LEW

WILLIAMS C. HALL and JEAN G. HALL,
Plaintiffs,
v.
CITY OF SANTA BARBARA,
a public entity,
Defendant.

COMPLAINT FOR DECLARATORY RELIEF, INJUNCTION, DAMAGES FOR VIOLATION OF CIVIL RIGHTS

A JURY TRIAL IS DEMANDED.
[Local Rule 3.4.10.1]

Filed: December 13, 1984

COME NOW plaintiffs, WILLIAMS C. HALL and JEAN G. HALL, and hereby allege the following:

PRELIMINARY ALLEGATIONS

1. Plaintiffs are citizens of the United States, and defendant, CITY OF SANTA BARBARA, (hereinafter sometimes "City") is a public entity located in the County of Santa Barbara, State of California, and the court has jurisdiction under 28 U.S.C. §§ 1331(a) and 1343(3) in that the claim arises under the Fifth and Fourteenth Amendments to the Constitution of the United States, and under 42 U.S.C. §§ 1981, 1983, and 1988 as more fully appears herein.

2. This is a civil action where the matter in controversy exceeds the sum of $10,000.00 exclusive of interest and costs.

3. Plaintiffs are the owners of the Los Amigos Mobile Home Estates within the City of Santa Barbara which are rented for residential purposes.

4. On or about August 14, 1984, the City Council of Santa Barbara adopted an ordinance, a copy of which is attached hereto, marked Exhibit "A", and by reference thereto fully incorporated herein, and the City of Santa Barbara, through its agents, employees and personnel, is enforcing the provisions of said ordinance.

5. Said ordinance has had the following effects:

a. The plaintiffs have been divested of their property rights in said real property to the extent that the tenants of mobile homes presently in their park, as well as their successors in interest, now have what amounts to a defeasible fee interest in the land upon which the mobile home park is located, and the plaintiffs have at best a possibility of reverter with the obligation to administer the property for the benefit of said tenants.

b. The tenants of said mobile home park have received a windfall in that the City of Santa Barbara, acting pursuant to the ordinance hereinbefore described, effectuated a transfer of wealth from landlords to tenants including plaintiffs herein, without just compensation.

6. As a direct and proximate result of the conduct herein complained of plaintiffs have suffered monetary damage in excess of $10,000.00, the full amount of which is presently unknown, and plaintiffs will seek leave of court to amend this complaint to reflect same when ascertained.

COUNT I

7. Plaintiffs incorporate herein by reference all of the allegations contained in all of the paragraphs of plaintiffs' Preliminary Allegations herein with the same force and effect as though set forth here *in haec verba.*

8. The enforcement of the ordinance by the City of Santa Barbara constitutes a taking of property by said defendant for private purposes in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and a deprivation of civil rights in violation of 42 U.S.C. §§ 1981 and 1983.

COUNT II

9. Plaintiffs incorporate herein by reference all of the allegations contained in all of the paragraphs of plaintiffs' Preliminary Allegations and Count I herein with the same force and effect as though set forth here *in haec verba.*

10. The enforcement of the ordinance by the City of Santa Barbara constitutes a taking of property by said defendant without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, and a deprivation of civil rights in violation of U.S.C. §§ 1981 and 1983.

COUNT III

11. Plaintiffs incorporate herein by reference all of the allegations contained in all of the paragraphs of plaintiffs' Preliminary Allegations and Counts I and II herein with the same force and effect as though set forth here *in haec verba.*

12. The ordinance is constitutionally infirm in that *no emergency* exists which justifies its imposition on plaintiffs, and therefore, continued enforcement violates the

Fifth and Fourteenth Amendments to the U.S. Constitution as well as 42 U.S.C. §§ 1981 and 1983.

COUNT IV

13. Plaintiffs incorporate herein by reference all of the allegations contained in all of the paragraphs of plaintiffs' Preliminary Allegations and Counts I, II and III herein with the same force and effect as though set forth here *in haec verba.*

14. The ordinance constitutes a restraint of competition and is invalid by virtue of the provisions of the Sherman Act (15 U.S.C. § 1 *et seq.*)

WHEREFORE, plaintiffs pray against defendant as follows:

1. For declaration that the ordinance is unconstitutional, invalid and unenforceable and that none of the parties hereto have any right, duty or obligation to comply with the terms or provisions thereof;

2. For a declaration that the ordinance constitutes a restraint of competition and is in conflict, and is therefore invalid, with the provisions of the Sherman Act (15 U.S.C. § 1 *et seq.*)

3. For a permanent injunction enjoining defendant, its agents, employees, and all those acting by, through, for, on behalf, or in concert with defendant, or pursuant to any of the provisions of the ordinance, from authorizing or engaging in, directly or indirectly, the enforcement of the ordinance;

4. For damages according to proof;

5. For costs of suit;

6. For attorneys fees;

7. For such other and further relief as to the Court seems just and proper.

DATED: December 12, 1984

Law Offices of
ROBERT J. JAGIELLO

ROBERT J. JAGIELLO
Attorney for Plaintiffs

A JURY TRIAL IS
DEMANDED.

Law Offices of
ROBERT J. JAGIELLO

ROBERT J. JAGIELLO
Attorney for Plaintiffs

ORDINANCE NO. 4285

AN ORDINANCE OF THE COUNCIL OF THE CITY OF SANTA BARBARA ADDING CHAPTER 26.08 TO THE MUNICIPAL CODE PERTAINING TO LEASES FOR MOBILEHOMES AND RECREATIONAL VEHICLE PARKS AND REPEALING ORDINANCE NO. 4227.

THE COUNCIL OF THE CITY OF SANTA BARBARA DOES ORDAIN AS FOLLOWS:

SECTION 1. Title of the Santa Barbara Municipal Code is amended by adding a new Chapter 26.08 to read as follows:

Chapter 26.08

MOBILEHOME AND RECREATIONAL VEHICLE PARK LEASE REGULATIONS

Sections:

26.08.010 Short Title.
26.08.020 Findings and Purpose.
26.08.030 Definitions.
26.08.035 Exemptions.
26.08.050 Lease Negotiation; Arbitration.
26.08.060 Rent Increase upon Transfer of Ownership.
26.08.070 Notices by Park Owner.
26.08.080 Enforcement.

26.08.010 *Short Title.*

Chapter 26.08 of Title 26 of the Santa Barbara Municipal Code may be cited as the "Mobilehome and Recreational Vehicle Park Lease Ordinance of the City of Santa Barbara."

26.08.020 *Findings and Purpose.*

A. The City Council finds and determines that there is a critical shortage of low and moderate income housing within the City and on the south coast of Santa Barbara County.

B. The City Council further finds and determines that mobilehome parks and recreational vehicle parks (also known as trailer parks) are a significant part of the remaining supply of low and moderate income housing in the City, and are frequently occupied by residents on a permanent basis. Many of the residents of these facilities are senior citizens on fixed incomes or other persons with limited economic means.

C. The City Council further finds and determines that rent increases in mobilehome and recreational vehicle parks represent a significant threat to the continued ability of park residents to afford to maintain residency in such parks. The economic impact of unaffordable rent increases on park residents is much more severe than rent increases on other tenants inasmuch as many park residents own their mobilehomes, recreational vehicles or trailers and, if forced to move because of rent increases, must bear the additional and substantial burden of paying to move those vehicles or mobilehomes to another site. There are very few places on the south coast of Santa Barbara County to which such mobilehomes or vehicles can be moved.

D. The purpose of this ordinance is therefore to regulate the rent charged for mobilehome and recreational vehicle spaces used on a permanent basis to prevent severe and inordinate rent increases, to protect certain persons of limited economic means from the disruption and expense of relocation and to provide increased certainty to park residents of their ability to maintain their

current status while at the same time providing park owners with a fair return on their investment and the continuing ability to maintain their parks.

26.08.030 *Definitions.*

The following words and phrases shall have the meaning indicated, unless the context or usage clearly requires a different meaning.

A. CAPITAL IMPROVEMENT. Any addition or betterment made to a mobilehome or recreational vehicle park which consists of more than a mere repair or replacement of an existing facility or improvement and which has a useful life of five or more years.

B. CONSUMER PRICE INDEX. The Urban Wage Earners and Clerical Workers Index, Los Angeles-Long Beach-Anaheim average, all items, as published by the United States Bureau of Labor Statistics, or such other index as may be approved by resolution of the City Council.

C. DEPARTMENT. The Community Development Department of the City of Santa Barbara.

D. MOBILEHOME. As defined in Section 28.04.415 of this Code.

E. MOBILEHOME PARK. As defined in Section 28.04.415.1 of this Code.

F. MOBILEHOME PARK SPACE. As defined in Section 28.04.415.2 of this Code.

G. MOBILEHOME RESIDENT. A person who rents a space in a mobilehome park.

H. PARK OWNER. The owner or operator of a mobilehome or recreational vehicle park or an agent or representative authorized to act on said owner's or opera-

tor's behalf in connection with the maintenance or operation of the park.

I. RECREATIONAL VEHICLE. As defined in Section 28.04.468 of this Code.

J. RECREATIONAL VEHICLE PARK. As defined in Section 28.04.468.1 of this Code.

K. RECREATIONAL VEHICLE PARK SPACE. As defined in Section 28.04.468.4 of this Code.

L. RECREATIONAL VEHICLE RESIDENT. A person who rents a space in a recreational vehicle park.

M. REHABILITATION WORK. Any renovation or repair work completed on or in a mobilehome or recreational vehicle park which was performed in order to comply with an order of a public agency, or to repair damage resulting from fire, earthquake, or other casualty.

N. RENT. The consideration, including any bonus, benefits or gratuity, demanded or received by a park owner for or in connection with the use or occupancy of a space, including but not limited to monies demanded or paid for the following: meals where required by the park owner as a condition of the tenancy, parking, furnishings, other housing services of any kind, subletting, or security deposits. (Housing services are defined as those services connected with the use or occupancy of a space including, but not limited to, utilities (light, heat, water and telephone), utility connections, ordinary repairs or replacement and maintenance, including painting. This term shall also include the provision of laundry facilities and privileges, common recreational facilities, janitor service, resident manager, refuse removal, storage facilities and any other benefits, privileges or facilities.)

O. RESIDENT. A mobilehome resident and a recreational vehicle resident.

P. SPACE. A mobilehome park space and a recreational vehicle park space.

Q. TENANCY. The right of a resident to use or occupy a space.

26.08.035 *Exemptions.*

This Chapter shall apply as of its effective date to all tenancies in mobilehome and recreational vehicle parks located in the City of Santa Barbara, except:

A. Tenancies used primarily for commercial purposes.

B. Tenancies in parks of four spaces or fewer, where one space is occupied by the park owner.

C. Tenancies in parks placed in operation after the effective date of this ordinance; provided, however, that such exemption shall continue in effect for only four (4) years after such creation.

D. Tenancies in spaces which a government agency owns, manages or operates.

E. Tenancies which both the park owner and the resident do not expect to exceed thirty (30) days.

26.08.040 *Lease Provisions.*

A lease shall include, at a minimum, the following provisions:

A. TERM; TERMINATION. No term shall be specified. The lease may be terminated only for one of the following reasons:

1. Failure of the resident to comply with a local ordinance or state law or regulation relating to mobilehomes or recreational vehicles within a reasonable time after the resident received a notice of

noncompliance from the appropriate governmental agency.

2. Conduct by the resident, upon the park premises, which constitutes a substantial annoyance to other residents.

3. Failure of the resident to comply with a lease provision or reasonable rule or regulation of the park. No act or omission of the resident shall constitute such a failure to comply unless and until the park owner has given the resident written notice of the alleged violation and the resident has failed to adhere to the lease provision or rule or regulation within seven (7) days.

4. Nonpayment of rent, utility charges, or reasonable incidental service charges.

5. Condemnation of the park.

6. Change of use of the park, provided that the provisions of subsection f of Section 798.56 of the California Civil Code and any applicable local ordinances are followed.

7. Cessation of occupancy by the tenant with (i) sixty (60) days prior notice to the park owner, or (ii) waiver of such notice by the park owner.

B. NOTICE. Notice of termination must be given in writing in the manner prescribed by Section 1162 of the Code of Civil Procedure at least sixty (60) days prior to the termination date of the tenancy. Said notice shall state the date the lease terminates, the reason for the termination or refusal to renew, and the specific facts; upon which the park owner is relying.

C. RENT INCREASES. A provision placing the following restrictions on a park owner's ability to increase the rent most recently and lawfully charged:

1. Rent for a space shall not be increased more frequently than once per year and all increases within any particular park shall occur at the same time each year.

2. Except as provided in Paragraph 3 of this Subsection C, a rent increase may not exceed the greater of (i) three-quarters of the percentage increase in the Consumers Price Index since the date of the last rent increase, or (ii) three (3) percent times the number of complete months since the date of the last rent increase divided by twelve.

3. A rent increase in excess of that allowed under Paragraph 2 of this Subsection C shall be allowed only to the extent it is approved by (i) the resident or (ii) an arbitrator acting pursuant to the provisions of Subsection D of this Section.

D. ARBITRATION. A provision establishing an arbitration mechanism for resolving disputes over (i) rent increase under Paragraph 3 of Subsection C of this Section, and (ii) any other issues which the parties agree to subject to arbitration. At a minimum, this provision shall specify as follows:

1. An impartial arbitrator shall be authorized to make final and binding decisions on disputed matters.

2. Arbitration shall be as expeditious as feasible and, whenever possible, should not exceed sixty (60) days from the date the arbitrator is selected to the date of the arbitrator's decision.

3. In the case of rent increase disputes:

a. The Department shall select a qualified arbitrator and shall prepare a contract to be executed by the arbitrator and park owner; and

b. The costs of the arbitrator shall be (i) paid by the park owner, and (ii) considered a reasonable operating expense within the meaning of clause (9) of Subparagraph d of this Paragraph 3 if the arbitrator approves the requested increase or any portion thereof; and

c. The arbitrator shall be authorized to examine all financial data relating to the park which is relevant to the dispute, and receive testimony (oral and written) from any affected resident of the park, the park owner or their representatives at a meeting open to all park residents affected by the proposed increase; and

d. The arbitrator shall approve such rent increase, if any at all, as is determined to be fair, just and reasonable within five days of the close of the arbitration hearing. The arbitrator's decision shall be mailed by the Department to the park owner and the affected residents or their designated representatives. In reaching that determination, the arbitrator shall consider the following factors, in addition to any other factors he or she considers relevant:

(1) Changes in the Consumer Price Index.

(2) The Voluntary Pay and Price Standards promulgated by the President of the United States or any other lawfully established state or federal government wage and price guidelines.

(3) The rent lawfully charged for comparable spaces in the County of Santa Barbara.

(4) The length of time since the last rent increase for the space or spaces specified in the rent increase proposal and the length of time

necessary to receive consideration by the arbitrator.

(5) Any proposed capital improvements or rehabilitation work related to the space or spaces specified in the rent increase application, and the cost thereof, including such items as materials, labor, construction interest, permit fees and other items as the arbitrator deems appropriate.

(6) Changes in property taxes or other taxes related to the subject park.

(7) Changes in the rent paid by the park owner for the lease of the land on which the subject park is located.

(8) Changes in the utility charges for the subject park paid by the park owner and the extent, if any, of reimbursement from the residents.

(9) Changes in reasonable operating and maintenance expenses, including interest and other expenses relating to the acquisition of the land and improvements of the park.

(10) The need for repairs caused by circumstances other than ordinary wear and tear.

(11) A change in the amount and quality of services provided by the park owner to the affected residents.

e. The arbitrator shall not consider changes in operating or other expenses caused by the park owner's refinancing of the park occurring after the date of adoption of this ordinance, except where the refinancing is both reasonable and necessary to make capital improvements to the park or is the

result of prior financial commitments specific to the park becoming due.

f. The arbitrator may provide that an increase in rent or a portion of an increase in rent granted by the arbitrator be limited to the length of time necessary to allow the park owner to reasonably amortize the cost of a capital improvement, including interest and a reasonable profit.

E. NO ASSIGNMENT. A provision stating that the lease is not assignable to a successor of the tenant in the absence of mutual consent of the parties.

26.08.050 *Lease Negotiation; Arbitration.*

A. MANDATORY PROVISIONS. The park owner shall offer each resident a lease which contains each of the provisions specified in Section 26.08.040, except to the extent that the parties have voluntarily agreed to modify or waive any such provision. The parties shall bargain in good faith to reach agreement on the language used to express the mandatory provisions, and shall submit any dispute which remains after such bargaining to arbitration as set forth in Paragraph C. These provisions shall be identified in the lease as "mandatory provisions."

B. OPTIONAL PROVISIONS. The lease may contain any additional provisions to which the parties agree. Either party may propose inclusion of optional provisions. The parties shall bargain in good faith with respect to the inclusion of any such optional provisions and shall submit any dispute which remains after such bargaining to arbitration as set forth in Paragraph C. The arbitrator may impose on the parties any optional provisions which the arbitrator finds will render the lease reasonable, equitable and consistent with other leases commonly used in similar facilities. These provisions shall be identified in the lease as "optional provisions."

C. ARBITRATION. Any disputes arising between a park owner and resident under this Section shall be deemed submitted to arbitration upon the expiration of sixty (60) days after commencement of negotiations. Either party may request arbitration. The arbitrator shall be selected as set forth in Section 26.08.040,D. The costs of the arbitrator shall be paid by the park owner. One half of such costs shall be considered a reasonable operating expense under clause (9) of subparagraph d of Paragraph 3 of subsection D of Section 26.08.040. The arbitrator shall render a decision within thirty (30) days, and the decision shall be final and binding upon the parties.

26.08.060 *Rent Increase Upon Transfer of Ownership.*

If a space is voluntarily vacated by all the existing tenants as a result of a transfer of legal ownership of the mobilehome or recreational vehicle, and it is not removed from the space, then the rent may be increased by an amount not to exceed ten percent (10%).

26.08.070 *Notices by Park Owner.*

Within thirty days of the adoption of this ordinance, and upon the renting of each park space thereafter, a park owner shall give each resident a written statement advising the resident of the existence of this ordinance. The park owner shall also maintain a current copy of the ordinance available for review at the manager's premises or other convenient location within the park.

26.08.080 *Enforcement.*

A. RENT INCREASES. A park owner may not collect rent in excess of the rent most recently and lawfully charged for a park space until (i) a lease is executed by both parties with respect to that space, or (ii) a resident fails to execute a lease in a form approved by the arbitra-

tor within thirty (30) days of the arbitrator's decision, which failure shall constitute a waiver by the resident of his or her rights under this Chapter.

B. COURT ORDER. Either party may bring an action in the Superior Court compelling the other party or the arbitrator to comply with the terms of this Chapter. Violation of this Chapter shall not be a misdemeanor, nor punishable by the imposition of civil penalties.

SECTION 2. Ordinance No. 4227 [An Ordinance of the Council of the City of Santa Barbara Temporarily Prohibiting Rent Increases in Mobilehome and Recreational Vehicle Parks] is repealed.

Bill No. 4272
Ordinance No. 4285
Adopted August 14, 1984

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 84-9506-LEW

WILLIAMS C. HALL and JEAN G. HALL,
Plaintiffs,

v.

CITY OF SANTA BARBARA, a public entity,
Defendant.

ORDER OF DISMISSAL

Filed: May 8, 1985

The motion of defendants for an order of dismissal for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) came on regularly for hearing by the court on April 15, 1985. Plaintiffs appeared by Robert J. Jagiello; defendant appeared by Steven A. Amerikaner, City Attorney.

On proof made to the satisfaction of the court that the motion to dismiss should be granted,

IT IS ORDERED that the motion be and hereby is, granted as to all counts and that the complaint be dismissed in its entirety.

Dated: May 7, 1985

LAUGHLIN E. WATERS
HONORABLE LAUGHLIN E. WATERS
District Judge

PRESENTED BY:

STEVEN A. AMERIKANER
City Attorney
Attorney for Defendants

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-5838
D.C. No. CV 84-9506 LEW

WILLIAMS C. HALL and JEAN G. HALL,
Plaintiffs-Appellants,

v.

CITY OF SANTA BARBARA,
Defendant-Appellee.

Appeal from the United States District Court
For the Central District of California
Hon. Laughlin E. Waters, District Judge, Presiding

Argued Pasadena, California — March 5, 1986
Submitted — April 11, 1986

OPINION

Before: SNEED and KOZINSKI, Circuit Judges; and SOLOMON,* District Judge.

KOZINSKI, Circuit Judge.

Filed: August 22, 1986

We review the district court's dismissal of plaintiffs' lawsuit seeking compensation for an alleged taking of property resulting from the operation of Santa Barbara's mobile home rent control ordinance.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

FACTS

Williams and Jean Hall own and operate the Los Amigos Mobile Home Estates, a mobile home park within the City of Santa Barbara. They provide tenants a plot of land and access to certain amenities such as water and electricity. Tenants install mobile homes, paying rent for use of the land and facilities.

Mobile homes are mobile only in the sense that they are not permanently anchored to a foundation. However, many mobile homes have no wheels and bear no other close resemblance to a motor vehicle. Nevertheless, in California they must display motor vehicle license plates, Cal. Veh. Code § 5352 (West 1971 & Supp. 1986), and are considered personal property (exempt from real property tax). Cal. Rev. & Tax. Code § 5810 (West Supp. 1986).

While tenants are free to remove their mobile homes when they move, in practice they rarely do so. California law normally prohibits mobile park operators from forcing tenants to remove mobile homes. Cal. Civ. Code § 798.73 (West 1982 & Supp. 1986). Tenants typically sell their homes to buyers who then succeed them as tenants of the mobile home park.

In August 1984 the City of Santa Barbara enacted a rent control ordinance applicable to mobile home parks. Santa Barbara, Cal., City Council Ordinance No. 4285, ch. 26.08 (Aug. 14, 1984) (hereinafter S.B. Ord.) The ordinance requires mobile park operators to offer their tenants leases of unlimited duration. These leases must provide certain key terms: They must be terminable by the tenants at will,[1] but by the mobile home operator only for

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[1] While this is not explicitly stated in the ordinance, it appears implicit in the regulatory scheme and has been so treated by the parties. *See* S.B. Ord. § 26.080.040A. As with much else on this

cause, narrowly defined by the ordinance;[2] rent increases are strictly limited;[3] and disputes about rent or lease terms are made subject to binding arbitration. S.B. Ord. § 26.08.040.

The Halls brought this action under 42 U.S.C. § 1983,[4] claiming that the ordinance effected a taking of their property and that such taking was neither for a public purpose nor justly compensated. Plaintiffs' claim was a novel one: they argued that by giving tenants the right to a perpetual lease at a below-market rental rate, the ordinance transfers to each of them a possessory interest in the land on which their mobile home is located. According to the Halls, this interest has a market value and a market: the market for mobile homes located in mobile home parks. According to the Halls, the price of mobile homes in their park shot up dramatically after enactment of the ordinance, with many selling far above their blue

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record, we have to surmise what remedies the ordinance may give the landlord in case of a tenant's untimely termination of the lease.

[2]A lease may be terminated only for one of the following reasons: (1) failure to comply with a local or state mobile home regulation; (2) conduct that constitutes substantial annoyance to other residents; (3) failure to comply with lease provisions or reasonable park rules; (4) non-payment of rent, utility charges or reasonable service charges; (5) condemnation of the park; (6) change in use of the park in accordance with California Civil Code Section 798.56(f); (7) cessation of occupancy by the tenant. S.B. Ord. § 26.08.040A.

[3]A park owner may unilaterally increase the rent once a year by three percent or by three-quarters of the increase in the Consumer Price Index, whichever is greater. S.B. Ord. § 26.080.040C. If the owner seeks a larger increase, he must submit his request to arbitration. *Id.* § 26.080.040C, D.

[4]The City of Santa Barbara is a "person" amenable to suit under 42 U.S.C. § 1983. *Owen V. City of Independence,* 445 U.S. 622, 638 (1980).

book value.[5] They claim that the substantial premium paid for mobile homes in parks subject to the Santa Barbara Ordinance reflects the transfer of a valuable property right to occupy mobile home parks at below-market rates.

The City of Santa Barbara filed a motion to dismiss and the Halls filed an opposition.[6] At a hearing held on April 15, 1985, the district court granted the motion.[7] The Halls appealed.

DISCUSSION[8]

It is axiomatic that "[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." 5 C. Wright & A. Miller, *Federal Practice & Procedure,* Civil § 1357, at 598 (1969).[9] This admonition

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[5]The blue book is the Kelley Blue Book for Manufactured Housing (Mobile Homes), published by the Kelley Blue Book Company of Costa Mesa, California. Like the similar blue book for automobiles, it is the standard reference for prices of mobile homes.

[6]Although the Halls' complaint was somewhat elliptical, the opposition to the motion to dismiss fairly advised defendant and the district court as to the nature of plaintiffs' claim. Under such circumstances, leave to amend the complaint, rather than dismissal, is the appropriate course of action. *See Forman v. Davis,* 371 U.S. 178, 182 (1962); *Scott V. Eversole Mortuary,* 522 F.2d 1110-(9th Cir. 1975).

[7]Because the district court did not prepare a written opinion, we would have found it useful to review a transcript of the hearing on the motion to dismiss, and particularly the district judge's bench ruling. Unfortunately, neither party made a transcript available.

[8]A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is a ruling on a question of law and as such is reviewable de novo. *Guillory v. County of Orange,* 731 F.2d 1379, 1381 (9th Cir. 1984).

[9]"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

is perhaps nowhere so apt as in cases involving claims of inverse condemnation where the Supreme Court itself has admitted its inability "to develop any 'set formula' " for determining when compensation should be paid, *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978), resorting instead to "essentially ad hoc, factual inquiries" to resolve this difficult question. *MacDonald, Sommer & Frates v. Yolo County,* 54 U.S.L.W. 4782, 4784 (U.S. June 24, 1986); *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979). While dismissal of a complaint for inverse condemnation is not always inappropriate, such a dismissal must be reviewed with particular skepticism to assure that plaintiffs are not denied a full and fair opportunity to present their claims. *See Whitney Benefits, Inc. v. United States,* 752 F.2d 1554, 1558-60 (Fed. Cir. 1985); *Yuba Goldfields, Inc. v. United States,* 723 F.2d 884, 887 (Fed. Cir. 1983).

In adjudicating a claim such as that presented by the Halls the court must resolve three questions: (1) Did the governmental action amount to a taking of property? *See, e.g., Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1000 (1984). (2) Did it advance a legitimate governmental interest? *See, e.g., Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980). (3) Was there just compensation? *See, e.g., Kaiser Aetna,* 444 U.S. at 179-80. If the first question is answered in the affirmative and either of the remaining two in the negative, plaintiffs prevail; otherwise they lose. In determining whether plaintiffs' case was properly dismissed, we examine each of these issues in turn, assuming, of course, that plaintiffs' allegations are all true.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *Sanders v. Kennedy,* No. 84-6370, slip op. at 6 (9th Cir. July 14, 1986); *North Star Int'l v. Arizona Corp. Comm'n,* 720 F.2d 578, 580 (9th Cir. 1983).

(1) *Was There a Taking of Property?*

Supreme Court cases addressing this question can be divided into two lines of authority:[10] the so-called regulatory taking case[11] and the physical occupation cases.[12] Regulatory taking cases are those where the value or usefulness of private property is diminished by regulatory action not involving a physical occupation of the property. A typical case of this sort is *Penn Central Transportation Co. v. New York City*, 430 U.S. 104 (1978), where New York City prohibited Penn Central from building a 55-story office tower over its Grand Central Terminal. Despite the drastic diminution in the value and usefulness of Penn Central's property, the Court held that the city's action did not amount to a taking.

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[10]The Court noted the existence of these two lines of authority in *Loretto v. Teleprompter Manhattan CATV Corp.*:

> Since these early cases, this Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation.

458 U.S. 419, 428 (1982).

[11]*E.g., United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S. Ct. 3108 (1985); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[12]*E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *United States v. Causby*, 328 U.S. 256 (1946); *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914).

Physical occupation cases are those where the government physically intrudes upon private property either directly or by authorizing others to do so. A typical case is *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), where New York City authorized Teleprompter to string 36 feet of one-half inch coaxial cable and place two switchboxes, all amounting to about one and one half cubic feet, on a private building. Despite the minimal burden placed on the property owner, the Court in *Loretto* held that a taking had occurred.

As *Penn Central* and *Loretto* demonstrate, the Court reaches dramatically different results depending on whether it concludes that a particular governmental action amounts to a physical occupation of property or merely a regulation. *See* R. Epstein, *Takings* 49-50, 94 (1985) (hereinafter Epstein).[13] As the Court explained in *Loretto*, the distinction lies in the fact that "a physical invasion [of property] is a government intrusion of an unusually serious character" for purposes of the taking clause. 458 U.S. at 433 (footnote omitted). Indeed, "a permenant physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine," *id.* at 432 (footnote omitted), and "without regard to the public interests that it may serve." *Id.* at 426. Elsewhere the Court noted that "when the 'character of the governmental action,' *Penn Central*, 438 U.S., at 124, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an impor-

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[13]Commentators have criticized this physical invasion/regulation distinction. *See* Epstein at 49-50; Blume & Rubinfeld, *Compensation for Takings; An Economic Analysis*, 70 Cal. L. Rev. 569, 574-75 (1984). Nevertheless, we are bound to respect the distinction as drawn by the Supreme Court.

tant public benefit or has only minimal economic impact on the owner." *Loretto*, 458 U.S. at 434-35. *See also Kaiser Aetna*, 444 U.S. at 179-80 ("the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation").

When viewed in the light most favorable to the Halls, the allegations of the complaint seem to present a claim for taking by physical occupation, as in *Loretto, Kaiser-Aetna* and their precursors. Reduced to its essentials, appellants' claim is that the Santa Barbara ordinance has transferred a possessory interest in their land to each of their 71 tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value. If proven, appellants' claims would amount to the type of interference with the property owner's rights the Court described so eloquently in *Loretto. See Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983) (Rehnquist, J., dissenting from dismissal for want of substantial federal question).[14]

The right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause.[15] *See United States v. General Motors Corp.*, 323 U.S. 373,

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[14]As appellee points out, Justice Rehnquist's lone dissent in *Fresh Pond* suggests that the other Justices did not share his ultimate conclusion that the rent control scheme there constituted a taking. However, as discussed below, *see* pp. 14-18 *infra, Fresh Pond* is distinguishable from this case in material ways that we presume were the basis for the majority's decision. We do not interpret the *Fresh Pond* dismissal as repudiating everything said by Justice Rehnquist in his dissent.

[15]Professor Michelman notes as follows in his seminal article on this subject:

378 (1945). Moreover, certain features of the Santa Barbara ordinance, and the way it is alleged to operate, make it peculiarly susceptible to the claim presented by the Halls. Thus, the ordinance directs the landlord to give tenants a lease, a recognized estate in land, lasting indefinitely.[16] Moreover, the landlord's residual rights in the property are largely at the mercy of his tenants; he loses practically all right to decide who occupies the property, and on what terms. If a tenant moves, the tenant alone decides who will be his successor by selecting the buyer for his rental unit; the landlord has no say as to who will live on the property, now or in the future.

Moreover, because of the way the ordinance is alleged to operate, the tenant is able to derive an economic benefit from the statutory leasehold by capturing the rent control premium when he sells his mobile home. In effect, the tenant is given an economic interest in the land that he can use, sell or give away at his pleasure; this interest (or its monetary equivalent) is the tenant's to keep or use,

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> [t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership.

Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967), *quoted with approval in Loretto*, 458 U.S. at 427 n.5.

[16]S.B. Ord. § 26.080.050A. We find entirely unpersuasive the city's argument that the ordinance does not give tenants any rights in the landlord's property because the parties are free to change the terms of the lease by mutual consent. That tenants may waive the rights provided for them by the ordinance does not render those rights any less real or valuable. Presumably tenants forego a statutory lease only if the landlord offers them someting better. A right is no less a right because it can be traded for someting else. Indeed, the contrary is true.

whether or not he continues to be a tenant. If the Halls' allegations are proven true, it would be difficult to say that the ordinance does not transfer an interest in their land to others. *See also* pp. 15-17 *infra*.

Loretto's explanation as to why a physical invasion of property is such a serious interference with the property owner's rights strongly supports the Halls' claim that they suffered a taking:

> Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. See *Kaiser Aetna*, 444 U.S., at 179-180; see also Restatement of Property § 7 (1936). Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, see *Andrus v. Allard*, [444 U.S.,] at 66, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the

> purchaser will also be unable to make any use of the property.

Loretto, 458 U.S. at 435-36 (emphasis original; footnote omitted).

Appellee's arguments supporting the district court's dismissal are not persuasive. Thus, it does not matter that the tenants' right to occupy space in the Los Amigos Mobile Home Estates is not truly perpetual because the ordinance might someday be repealed. A governmental taking can always be undone if the government so chooses. That has never defeated a taking claim. *See*, e.g., cases cited nn. 11 & 12 *supra*. *See also San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656-57 (1981) (Brennan, J., dissenting).[17] Nor does the fact that tenants may be removed for cause, *see* p.3 & n.2 *supra*, defeat the Halls' claim. The ability to remove tenants for cause may lessen somewhat the economic impact of the Santa Barbara ordinance; it does not change the fact that

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[17]Two commentators have addressed a closely related problem in the following terms:

> The Supreme Court . . . holds that it is the rights of the *property owner*, not the rights of the *property*, that have significance.
>
> To account for those rights, one must abandon abstract calculations which obfuscate the problem by attempting to relate use prohibitions for periods of years to the perpetual life of the realty. Instead, one must examine the hardship placed on individuals by such actions. Sometimes delay in ability to use property leads to foreclosure. Sometimes the owner dies. Given the reality of inflation, the cost of developing the property may increase. Real estate taxes continue to be demanded, often by the entity which is preventing the property from being used.

Berger & Kanner, *Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 Loyola L.A. L. Rev. 685, 744-45 (1986) (emphasis original; footnotes citing examples omitted).

tenants are given an indefeasible right to possession so long as they pay the controlled rent and behave themselves.

Nor does it matter that the physical occupation here is by tenants and not by the City of Santa Barbara itself. The Court addressed this point in *Loretto*, holding that "[a] permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." 458 U.S. at 433 n.9; *see* Epstein at 187. Also put to rest by *Loretto* is the notion that the physical occupation is not permanent where the landlord could evict the tenants by going out of business.[18] The Court gave short shrift to this argument, noting that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Loretto*, 458 U.S. at 439 n.17.

The city's argument that appellants are adequately compensated by the rents they receive is irrelevant to the determination of whether a taking has occurred. *See Troy Ltd. v. Renna*, 727 F.2d 287, 300 (3d Cir. 1984). Whether

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[18]In any case, we note some skepticism as to whether this is an option realistically available to the Halls. State and local laws seem to pose considerable obstacles to going out of the mobile park business. State law allows the mobile park owner to evict tenants in order to put the park to a different use only upon giving six months' notice; such notice may only be given after all necessary local permits have been obtained. Cal. Civil Code § 798.56(f). Santa Barbara in turn requires that a mobile home park owner obtain a permit to convert a park to another use. Santa Barbara, Cal., Municipal Code ch. 28.78.010 (1984). An applicant for such a permit must file a plan outlining the use to which the property is to be put, describing the impact of the removal on displaced residents, and disclosing the relocation assistance to be provided. *Id.* ch. 28.78.040. Any such plan must be approved by the city's Community Development Department. *Id.* ch. 28.78.050.

compensation is adequate is an inquiry separate from whether there has been a taking. In *Loretto*, for example, state law provided for compensation. The Court nevertheless determined that there was a taking through physical occupation. It left it to the state courts to determine whether the compensation provided was adequate. 458 U.S. at 441. We address this question below. *See* pp. 21-22 *infra*.

Finally, the city cites various cases,[19] some of them decided since *Loretto*,[20] where rent control statutes or ordinances have been upheld. Essentially, the city suggests that, whatever the applicability of taking law to other governmental actions, rent control is conclusively constitutional. We cannot agree. In light of the Supreme Court's own unwillingness to provide any hard and fast rules in this sensitive area, we cannot indulge the notion that a city may eviscerate a property owner's rights and shield its action from constitutional scrutiny by calling it rent control.[21]

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[19]*See, e.g., Block v. Hirsh*, 256 U.S. 135 (1921) (upholding District of Columbia rent control ordinance as a temporary measure); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948) (upholding rent limits on certain accommodations in "defense-rental areas" as a valid exercise of the war power).

[20]*See, e.g., Fisher v. City of Berkeley*, 105 S. Ct. 2653 (1985) (dismissing appeal of ruling that rent control statute need not provide landlord a reasonable return on his investment); *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983) (dismissing appeal of ruling upholding rent control statute limiting right to remove a tenant for personal use of rental unit); *Troy Ltd. v. Renna*, 727 F.2d 287 (3d Cir. 1984) (upholding New Jersey law prohibiting eviction of certain older tenants from apartments converted to condominiums).

[21]*Troy Ltd. v. Renna*, 727 F.2d 287 (3d Cir. 1984), does contain language suggesting that a rent control ordinance can never constitute a taking because occupancy of the property by tenants is a

We have examined the cases cited by the city and find them distinguishable in a way we think the Supreme Court would find material. In none of the cited cases has the landlord claimed that the tenant's right to possess the property at reduced rental rates was transferable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others.

This is not a minor difference; it is crucial. The fact that the tenant can sell his interest to third parties drastically affects the economic realities of the landlord/tenant relationship. The typical rent control statute modifies the landlord/tenant relationship somewhat to protect tenants from perceived evils of the free-enterprise system. *But see* n.26 *infra*. By contrast, the Santa Barbara Ordinance, as it is alleged to operate, changes the fundamental relationship between the parties, giving landlord and tenant complementary estates in the same land. On the one hand, the landlord loses forever a fundamental aspect of fee simple ownership: the right to control who will occupy his property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him when he leaves the property, or even the City of Santa Barbara.

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private rather than a public use for purposes of the taking clause. *Id.* at 301-03. This attempt to distinguish *Loretto* was effectively overruled by *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), which squarely held that transferring property "in the first instance to private beneficiaries does not condemn that taking as having only a private purpose." 467 U.S. at 243-44.

In any case, *Troy* must be read in light of its facts, which are materially distinguishable from ours. *See, e.g.*, n.22 *infra*. Despite the broad language used in the opinion, we doubt that the *Troy* court would conclude that government may take private property from one person and give it to another without implicating the taking clause.

That tenants normally cannot sell their rights in rent controlled property provides important safeguards for landlords. Tenants, like the rest of us, are not immortal; nor are they immune to the normal familial and economic pressures that occasion vacancies even in rent controlled housing.[22] If they are denied the right to cash out, tenants can enjoy the benefits of rent control only so long as they remain tenants, not beyond. When the premises become vacant, the landlord is able to reassert a measure of control over the property. He may chose to occupy it himself; or to allow a friend or relative to stay there; or to keep it vacant; or make improvements in hope of raising the rent to the extent allowed by law; or to rent it to a new tenant, presumably making the selection on the basis of factors that will maximize his total return from the property.[23] Between tenants, the landlord can thus assert

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[22]This was a key point supporting the court's conclusion that no taking had occurred in *Troy*, a case on which the city relies heavily. *Troy* noted that "[m]ost tenants with a protected status will be 70 years of age (or, if surviving spouses, 58 years of age) before the Tenancy Act comes into play. It is fanciful to imagine that these tenants will occupy their units 'permanently.' Moreover, the tenancies may terminate by virtue of changing income levels or principal residences, and tenants may be evicted on any of thirteen grounds." 727 F.2d at 301.

[23]Even if the property owner may not increase his monetary income by raising the rent, his choice of tenants may increase his economic return in some other fashion. Thus, he may choose tenants with smaller families over those with larger ones, on the theory that fewer people place less of a strain on the mobile park's resources. For similar reasons, he may prefer families without pets and those where the breadwinner travels a lot. On the theory that frequent vacancies increase his control over the property, or allow for faster rent increases (*see* S.B. Ord. § 26.080.060), he may well prefer older tenants to younger ones.

In addition to selecting on the basis of factors that enhance his economic return, the landlord may also select on the basis of

important prerogatives as property owner and make significant decisions as to the property's use. The tenant, for his part, must make difficult choices: if he wants the benefits of the rent control ordinance, he must stay put. If he wants to leave, he must give up a good thing.[24]

In short, under a rent control scheme where the tenant is not allowed to monetize his rights, benefits and burdens are shifted somewhat between landlord and tenant, but neither gets the full bundle of sticks. By contrast, as the Santa Barbara ordinance is alleged to operate, landlords are left with the right to collect reduced rents while tenants have practically all other rights in the property they occupy. As we read the Supreme Court's pronouncements, this oversteps the boundaries of mere regulation

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noneconomic factors that nevertheless increase the total benefit he derives from the property. *See* A. Alchian & W. Allen, *University Economics* 146 (3d ed. 1972) (hereinafter Alchian & Allen). Thus, landlords may select attractive pleasant applicants over slovenly belligerent ones, and nonsmoking teetotalers over smokers who drink.

The landlord's ability to exercise these choices with respect to the property is an important attribute of ownership and allows him to retrieve, in some measure, the monetary loss he suffers as a result of rent control. To the extent these choices are narrowed or eliminated altogether, the burden on the landlord is increased and his essential attributes of ownership are eroded until they become illusory.

[24]The inability of tenants to transfer rights in rent controlled property no doubt creates market inefficiencies. *See* Alchian & Allen at 154; P. Samuelson & W. Nordhaus, *Economics* 393-94 (12th ed. 1985); Muth, *Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 691, 694-95 (1983). However, "[n]othing in economic analysis warrants a judgment about which allocative procedures are good or bad. That judgment must be based on criteria derived from other sources." Alchian & Allen at 154. Here, the very fact of the inefficiency — that the tenant is not given too great a stake in the property — saves most rent control schemes from potential unconstitutionality. After all, efficiency would be maximized by giving the tenant a fee simple interest in the property.

and shades into permanent occupation of the property for which compensation is due.

(2) *Did the Ordinance Substantially Advance a Legitimate State Interest?*

We first note a potentially significant difference in the standard by which governmental action must be adjudged depending on whether it is a deliberate exercise of the eminent domain power or regulatory action that results in an incidental taking. In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Court explored the meaning of the "public use" requirement in the fifth amendment's eminent domain clause. The Court held that "[t]he 'public use' requirement is ... coterminous with the scope of a sovereign's police powers." 467 U.S. at 240. The Court also held that it would not "substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' " 467 U.S. at 241 (quoting *United States v. Gettysburg Electric R.R.*, 160 U.S. 668, 680 (1896)).

The Court in *Midkiff* did not address the somewhat different articulation of the standard applicable in cases where there was no deliberate exercise of the eminent domain power. For example, it did not mention *Agins v. City of Tiburon*, 447 U.S. 255 (1980), where it had noted that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests...." *Id.* at 260 (citing *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928)); *see also United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 459 (1985) (citing *Agins*); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (same). The *Midkiff* Court left open the possibility that less deference would be afforded where govern-

ment does not intend to effect a taking than where it does. *See Midkiff*, 467 U.S. at 241 (distinguishing *Missouri Pacific R.R. v. Nebraska*, 164 U.S. 403, 416 (1896), on the ground that "the 'order in question was not, *and was not claimed to be* [emphasis original], . . . a taking of private property for a public use under the right of eminent domain' ").[25]

Even under the deferential *Midkiff* standard, public use is not established as a matter of law whenever the legislature acts. While the scope of judicial scrutiny is narrow, "[t]here is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power." *Midkiff*, 467 U.S. at 240. The test appears to be whether the legislature chose an objective that is within its authority under the police power, and whether it *"rationally could have believed* that the [Act] would promote its objective." 467 U.S. at 242 (emphasis original) (quoting *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 671-72 (1981)). The test in inverse condemnation cases may well be more stringent.

Here, the Santa Barbara City Council enacted the ordinance to alleviate what it perceived as "a critical shortage of low and moderate income housing." S.B. Ord. § 26.08.020A. If appellants' allegations are substantiated, there would be significant doubt whether these purposes

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[25]It makes considerable sense to give greater deference to the legislature where it deliberately resorts to its eminent domain power than where it may have stumbled into exercising it through actions that incidentally result in a taking. In the former case, the court is validating the will of the legislature; in the latter, it may be thwarting the legislative will by ordering compensation where the legislature had no intention of engaging in a compensable transaction.

are achieved, or could rationally be thought achievable, by means of the ordinance.

If appellants are able to prove their allegations, it would seem that the Santa Barbara ordinance will do little more than give a windfall to current mobile park tenants at the expense of current mobile park owners. If, as appellants allege, the ordinance has resulted in a substantial increase in the market price of mobile homes subject to the ordinance, this may well hinder rather than assist lower-income families seeking access to rental units in mobile park homes. We express no view on this score; we merely hold that the issue must be considered and addressed by the district court on the basis of a complete record.[26]

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[26]We also note what appears to be a growing consensus that "rent control causes a reduction in the quality of the existing rental housing stock and discourages investment in new rental property," actually exacerbating the problems it is intended to ameliorate. The Report of the President's Commission on Housing 91 (1982). *See, e.g.*, P. Samuelson & W. Nordhaus, *Economics* 393-94 (12th ed. 1985); W. Baumol & A. Blinder, *Economics: Principles and Policy* 62-64 (3d ed. 1985); Muth, *supra* note 24, at 693-98; *cf.* Frey, Pommerehne, Schneider & Gilbert, *Consensus and Dissension Among Economists: An Empirical Inquiry*, 74 Amer. Econ. Rev. 986, 988, 991 (1984) (fewer than 2 percent of United States economists surveyed at random generally disagreed with the proposition that "[a] ceiling on rents reduces the quantity and quality of housing available")' *see also Rent Control's Big Dilemma*, San Francisco Chron., Feb. 28, 1986, at 76, col. 1. The rationality of rental control *vel non* may have to be reassessed in light of this growing body of thought on the subject. *Cf. Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 54 U.S.L.W. 4319, 4323 (U.S. March 26, 1986) (reexamining inference to be drawn in predatory pricing cases in light of recent law and economics commentary on the subject).

(3) *Was Adequate Compensation Paid?*

The adequacy of compensation, if any, paid to appellants is yet another inquiry fraught with factual uncertainty. The city would short-circuit this process by arguing that appellants are adequately compensated because they are entitled to rent that assures them a fair return on their investment. That, however, is not the test in cases involving a claim of taking by physical invasion, as opposed to mere regulation. For example, Mrs. Loretto's claim was not defeated because she continued to collect rents on the apartment building upon which the cable was strung. *See Loretto,* 458 U.S. at 442.[27]

Here, the rental payments compensate the Halls for use of the land during the rental period, plus whatever amenities they provide tenants. However, if their claim is substantiated, the Halls are entitled to additional compensation for the taking of their property: the possessory interest in the land allegedly transferred to each of their tenants. It may well be that the rental payments (together with such increases as are permitted under the ordinance) adequately compensate the Halls for the taking of their property. However, this cannot be assumed; it must be proven. To make this determination, the court must ascertain the value of the interest allegedly transferred to each tenant and the value of what the Halls received, if anything, in addition to normal rental payments. All these are matters that must be considered by the district court on remand.[28]

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[27]The cases appellee cites, *e.g., Agins,* 447 U.S. 255, and *Penn Central,* 438 U.S. 104, stand for the proposition that the existence of residual economic value in the property defeats a taking claim where a regulatory taking is alleged. This rationale simply does not apply to cases involving a taking by physical occupation.

[28]The city also argues that the Halls' claim is premature, citing *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 105

CONCLUSION

Because there has been no trial, we cannot and do not express any view as to whether the Santa Barbara ordinance constitutes a taking. We hold only that, on the facts alleged, it may, and that at this stage we are unable to resolve this fact-bound issue. In such circumstances, the motion to dismiss was improvidently granted and we remand the case to the district court for further proceedings consistent with this opinion.

S. Ct. 3108 (1985). It is not clear what the city would have the Halls do to perfect their claim. Unlike *Williamson* and the more recent case of *MacDonald, Sommer & Frates v. Yolo County,* 54 U.S.L.W. 4782 (U.S. June 25, 1986), the Halls have no further administrative recourse available; there is nothing they may do under the Santa Barbara ordinance that would exempt them from its reach or cut off the rights they claim tenants now have in their land.

Williamson and *MacDonald* were regulatory taking cases, not physical invasion cases. By their nature, regulatory taking cases are not ripe for constitutional adjudication until the governmental authority has had its final say, thereby defining precisely what (if anything) was taken. As the Court said in *MacDonald,* "[u]ntil a property owner has 'obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property,' 'it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed.' " 54 U.S.L.W. at 4784 (quoting *Williamson,* 105 S. Ct. at 3118 n.11). This, of course, is the test in regulatory taking cases, not physical invasion cases.

The inapplicability of the *Williamson/MacDonald* line of cases underscores the difference between this case and the regulatory taking cases on which the city relies so heavily. Where there has been a physical invasion, the taking occurs at once, and nothing the city can do or say after that point will change that fact.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-5838

D.C. No. CV 84-9506 LEW

WILLIAMS C. HALL and JEAN G. HALL,
Plaintiffs-Appellants,
v.
CITY OF SANTA BARBARA,
Defendant-Appellee.

ORDER

Filed: March 9, 1987

Before: SNEED and KOZINSKI, Circuit Judges, and SOLOMON, District Judge.*

The typescript version of the opinion is amended as follows:

Add this sentence to the end of n.3 on page 3:

> In addition, whenever the space becomes vacant, the landlord may raise the rent by up to 10%.

Add the following sentence at the end of footnote 6, on page 4:

> We believe the district court abused its discretion by dismissing rather than giving plaintiffs an opportunity to amend the complaint.

Insert the word "meaningful" immediately after "the landlord has no" on page 10, line 11 of the opinion. On the same page, in the last line of text, change "the" to "a".

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*Judge Solomon died before this order was filed.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-5838

D.C. No. CV 84-9506 LEW

WILLIAMS C. HALL and JEAN G. HALL,
Plaintiffs-Appellants,
v.
CITY OF SANTA BARBARA,
Defendant-Appellee.

ORDER

Filed: March 9, 1987

Before: Joseph T. Sneed and Alex Kozinski, Circuit Judges, and Gus J. Solomon,* District Judge.

Dissent by Judge Schroeder, with whom Nelson and Norris, Circuit Judges, join, dissenting from denial of en banc hearing.

COUNSEL

Robert J. Jagiello, Santa Monica, California, for the plaintiffs-apellants; and Latham and Watkins, David B. Koff, Los Angeles, California, for the amicus curiae.

Steven A. Amerikaner, City Attorney, Santa Barbara, California, for the defendant-appellee; and Richards, Watson, Dreyfuss & Gershan, Michael Jenkins, City Attorney of the City of Westlake Village, Los Angeles, California, for the amicus curiae.

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*Judge Solomon voted on the petition for rehearing but died before this order was filed.

ORDER

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and upon the vote of the eligible judges in active service, a majority failed to vote for en banc rehearing.

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

SCHROEDER, Circuit Judge, with whom Nelson and Norris, Circuit Judges join, dissenting from the denial of en banc hearing:

> I respectfully dissent from the order denying en banc reconsideration of this case. The panel opinion holds that a city regulation controlling mobile home park rents may be a physical taking compensable under the fifth and fourteenth amendments, *Hall v. City of Santa Barbara*, 797 F.2d 1493 (9th Cir. 1986). The ordinance at issue, however, is in all material respects identical to three rent regulation challenges that the Supreme Court dismissed in recent years as lacking a substantial federal question. *Fisher v. City of Berkeley*, 105 S. Ct. 2653 (1985); *Nash v. City of Santa Monica*, 105 S. Ct. 1740 (1985); *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 104 S. Ct. 218 (1983). The panel decision is thus contrary to controlling authority. The decision also conflicts with another circuit's opinion rejecting a similar taking challenge in light of the Supreme Court's dismissal of *Fresh Pond, Troy Ltd. v. Renna*, 727 F.2d 287, 303 (3d Cir. 1984) (upholding tenancy act protecting senior citizens and disabled persons).

The panel opinion attempts to distinguish this case because, under a state statute unrelated to rent control, the tenant has the right to sell the mobile home without removing it from the park. *Hall*, 797 F.2d at 1501-02 (discussing effects of Cal. Civ. Code § 798.73 (West 1982 & Supp. 1986)). Rent control makes these on-site sales attractive to buyer and seller. Santa Barbara's ordinance, however, has the same effect on the landlord as the rent ordinances in *Fisher, Nash, Fresh Pond*, and *Troy*. The landlord must allow tenants to live in mobile home parks under controlled rent so long as they do not give any cause for eviction. S.B. Ord. § 26.08.040.

The reason that the Supreme Court has had little difficulty with rent control cases is that economic regulation of landowners' profit does not constitute a taking so long as the owner is allowed a reasonable return on investment. *See, e.g., Connolly v. Pension Benefit Guaranty Corp.*, 106 S. Ct. 1018, 1026-27 (1986); *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 460 n.6 (1985); *Williamson County Regional Planning Commission v. Hamilton Bank*, 105 S. Ct. 3108, 3119 (1985); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S. Ct. 2862, 2875 (1984); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S. Ct. 2035, 2042 (1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-25, 98 S. Ct. 2646, 2659-60 (1978). *See also Troy*, 727 F.2d at 300; *Kargman v. Sullivan*, 582 F.2d 131, 134 (1st Cir. 1973). The Santa Barbara ordinance does not deprive landlords of a reasonable return on their investment. In fact, the ordinance mandates that park owners receive a fair investment return. S.B. Ord. § 26.08.020(D).

The panel therefore attempts to distinguish this case from all other cases involving economic regulation of property by asserting that the claimed interference here

is tantamount to a "physical invasion" of the property. *Hall*, 797 F.2d at 1498. This is, of course, the same argument the Supreme Court refused to consider in *Fresh Pond*; the *Hall* analysis is borrowed from Justice Rehnquist's lone dissent from that dismissal, 464 U.S. at 875, 104 S. Ct. at 218 (Rehnquist, J., dissenting).

The panel acknowledges that the economic regulation cases withstand even "drastic diminution in the value and usefulness" of property. *Hall*, 797 F.2d at 1497 (citing *Penn Central*). Because the Supreme Court held in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164 (1982), that the extent of interference with the actual use of the property becomes irrelevant when the deprivation is physical, the panel is forced to characterize this ordinance as authorizing a "physical occupation." Its decision relies almost exclusively upon Justice Marshall's opinion in *Loretto*. That opinion therefore deserves close attention.

Loretto makes a sharp distinction between permanent, physical occupations, on the one hand, and regulations impairing use, or even causing temporary injury to property, on the other. The hallmark of the physical invasion described in *Loretto* is actual appropriation of the land itself through physical contact, as, for example, through flooding or direct occupancy. *Loretto* concerned the installation of cable, a "direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall." *Id.* at 438, 102 S. Ct. at 3177. Under the *Loretto* analysis, "placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." *Id.* at 437, 102 S. Ct. at 3177. Once the fact of occupation is shown, compensation is required regardless of the extent of the physical occupation. *Id.* at 436-37, 102 S. Ct. 3176-77. Thus *Loretto*

holds that physical invasion requires compensation for a relatively minor and almost insignificant interference with the use of property. Moreover, a taking can be found under this theory without consideration of the important public benefits achieved by the action. *Id.* at 434-35, 102 S. Ct. at 3175.

The panel's appellation of rent control as a "physical invasion," is built upon the notion that economic regulation can "shade" into physical invasion. *Hall*, 797 F.2d at 1502. This is antithetical to the reasoning of *Loretto*. In the final pages of *Loretto*, the Court expressly characterized its holding as a "very narrow" one, 419 U.S. at 441, 102 S. Ct. 3179, and distinguished the physical occupation from cases involving the government's power to regulate land — specifically, landlord-tenant relationships.

> Finally, we do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L.Ed.2d 258 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 66 S. Ct. 850, 90 L.Ed. 1096 (1946) (fire regulation); *Bowles v. Willingham*, 321 U.S. 503, 64 S. Ct. 641, 88 L.Ed. 892 (1944) (rent control); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 54 S. Ct. 231, 78 L.Ed. 413 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 42 S. Ct. 289, 66 L.Ed. 595 (1922) (emergency housing law); *Block v. Hirsch*, 256

U.S. 135, 41 S. Ct. 458, 65 L.Ed. 865 (1921) (rent control).

Id. at 440, 102 S. Ct. 3178. We now in this circuit face, as a result of the *Hall* opinion, the very "dire consequences" that the Court intended to avoid in *Loretto*.

In addition to all of these infirmities, the *Hall* opinion in Part II adopts a view, heretofore spurned by the Supreme Court as a tool of constitutional analysis, which may well create even broader turmoil in other fields of economic regulation. 797 F.2d at 1502-03. It endorses the proposition that the constitutionality of a regulation depends not upon a court's assessment of its legal consequences, but upon economists' assessment of its practical effectiveness. The panel suggests in a footnote, for example, that we may have to reassess the rationality of "rent control *vel non*" in light of the growing literature on the subject. *Id.* at 1503 n.26.

The opinion acknowledges that the Santa Barbara City Council enacted the ordinance to "alleviate what it perceived as [a] 'critical shortage of low and moderate income housing.' " *Id.* at 1503. Then it assails the ordinance for failing to live up to that purpose. *Id.* "Significant doubt" as to whether a legislative body's goals are in fact achieved is not sufficient to warrant striking down an ordinance, however. Legislation passes muster if the legislature reasonably could have concluded that its action would promote a legitimate state interest. *Williams v. Vermont*, 105 S. Ct. 2465, 2472 (1985). The judiciary does not have the power to sit as a "superlegislature" second-guessing the wholly economic regulations of state and local governments. *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2516-17 (1976) (per curiam).

This case is important. Although it is not a decision on the merits invalidating any ordinance, it is an authoriza-

tion for broad, wholesale attacks upon rent control regulation. It casts a shadow upon all economic regulation. Our court must now sit idly by and watch taxpayers' money and court time being expended in litigation over the effects of this decision. I regret that we did not take this case en banc and put our circuit back in line with the Supreme Court and the rest of the country.

APPENDIX F

SANTA BARBARA MUNICIPAL CODE
CHAPTER 28.78

MOBILEHOME AND PERMANENT RECREATIONAL VEHICLE PARK CONVERSION REGULATIONS

Sections:

28.78.010 Permit Required for Conversion of Mobilehome and Permanent Recreational Vehicle Parks; Conversion Defined.
28.78.020 Issuance of Conversion Permits.
28.78.030 Physical Standards for Conversion of Mobilehome and Permanent Recreational Vehicle Parks to Condominiums or Overnight Recreational Vehicle Parks.
28.78.040 Application Requirements for Conversion Permits.
28.78.050 Acceptance of Reports.
28.78.060 Public Hearing.
28.78.070 Findings.

28.78.010 *Permit Required for Conversion of Mobilehome and Permanent Recreational Vehicle Parks; Conversion Defined.*

A. PERMIT REQUIRED. No person, firm, corporation, partnership or other entity shall convert the use of any existing mobilehome park or permanent recreational vehicle park without first having said conversion tentatively approved by the Planning Commission, or the City Council on appeal, and having been issued a conversion permit by the Chief of Building and Zoning.

B. CONVERSION DEFINED. For purposes of this Chapter, "conversion" shall mean use of a

mobilehome or permanent recreational vehicle park or a portion of a mobilehome or permanent recreational vehicle park for a purpose other than the rental, or the holding out for rent, of two (2) or more mobilehome or recreational vehicle spaces to accommodate mobilehomes or recreational vehicles and shall not mean the adoption, amendment or repeal of a park rule or regulation. "Conversion" may affect an entire park or any portion thereof, and such "conversion" shall include, but is not limited to, a conversion of a park or any portion thereof to a condominium, stock cooperative, residential development, commercial use, office use, manufacturing use or vacant land. Any conversion to condominiums shall be subject to Sections 28.88.050, 28.88.060, 28.88.070, 28.88.080, 28.88.090 and Section 28.88.100 of this Title, in addition to the provisions of this Chapter. For the purposes of this Chapter, condominiums shall be deemed to include community apartments and stock cooperatives. (Ord. 4269, 1984.)

28.78.020 *Issuance of Conversion Permits.*

A. CRITERIA. The Chief of Building and Zoning shall issue a conversion permit when he determines that:

1. The applicant has complied with all the applicable City, state and federal laws and regulations in effect at the time that the conversion was approved; and

2. The applicant has complied with all of the conditions of approval.

B. REVOCATION. Once issued, the conversion permit may be revoked if the applicant or his successors in interest fails to comply with the conditions of approval or other applicable laws.

C. EXPIRATION. For a conversion involving a subdivision, a tentative conversion approval shall expire when the tentative subdivision map expires. For a conversion not involving a subdivision a tentative approval shall expire after the same period of time as if it were a project requiring a tentative subdivision map. (Ord. 4269, 1984.)

28.78.030 *Physical Standards for Conversion of Mobilehome and Permanent Recreational Vehicle Parks to Condominiums or Overnight Recreational Vehicle Parks.*

A. STANDARDS. In order to convert the use of a mobilehome or permanent recreational vehicle park to mobilehome or recreational vehicle condominiums, said park shall be brought up to the standards for construction of new mobilehome or permanent recreational vehicle parks as established in Section 28.94.040 and 28.94.045 of this Code. In cases where (i) the applicant can demonstrate that the standards cannot or should not reasonably be met, and (ii) 75% of the current residents of an applicant's park have expressed a written intent to purchase the park from the applicant, said standards may be waived or modified by the Planning Commission.

B. CONVERSION. In order to convert the use of a mobilehome or permanent recreational vehicle park to an overnight recreational vehicle park, said overnight recreational vehicle park shall meet all standards required by Section 28.94.050 of this Code. (Ord. 4269, 1984.)

28.78.040 *Application Requirements for Conversion Permits.*

In addition to such other application requirements as the Planning Commission may deem necessary, no application for a conversion permit shall be accepted for any purpose unless it includes the following:

A. CONCEPT PLAN. A written statement and concept plan indicating the use the park site is intended to accomodate, including the approximate number of proposed residential units, if any; approximate square footage and use of any buildings proposed; and the probable impacts/benefits to the community created by the proposed project

B. SITE PLAN. A site plan of the existing mobilehome or permanent recreational vehicle park showing all existing mobilehome and recreational vehicle spaces, identified by number and indicating whether the space is currently occupied.

C. RESIDENTS LIST. A list of the names and addresses of all residents of the mobilehome or permanent recreational vehicle park.

D. IMPACT REPORT. A report on the housing and financial impacts of the removal of the mobilehomes and recreational vehicles upon all displaced residents. The report shall include but not be limited to the following six items except where the applicant can demonstrate that such is not available.

1. Rental rate history for each space for the previous five (5) years;

2. Monthly vacancy rate for each month during the preceding two years;

3. Makeup of existing resident households, including family size, length of residence, age of residents, estimated household income, and whether receiving federal or state rent subsidies;

4. The date of manufacture and size of each mobilehome and recreational vehicle in the park;

5. A list of those mobilehomes or recreational vehicles that cannot qualify for relocation to another park within reasonable proximity to the City; and

6. A statement of availability and location of equivalent replacement space in mobilehome or recreational vehicle parks within reasonable proximity to the City.

E. RELOCATION ASSISTANCE PLAN. A relocation assistance plan shall be prepared by the applicant which states all measures proposed by the applicant to mitigate any identifiable adverse impacts of the conversion on the displaced permanent residents of the mobilehome or permanent recreational vehicle park. Every relocation assistance plan shall provide, at a minimum, that displaced permanent residents will be provided relocation benefits equal to those required by Section 28.88.100 of this Code. A permanent resident (a) is a person (i) for whom the unit he owns is his sole residence, or (ii) who has rented the mobilehome or recreational vehicle for a period of at least nine consecutive months, and (b) does not include a person who has resided in the park for one year or less prior to the date of application for the conversion permit, provided the person was given written notice of the owner's intention to convert prior to agreeing to reside in the park.

F. EVIDENCE OF NOTICE. The applicant shall submit evidence that a notice of intent to convert was delivered to each resident for whom a signed copy of said notice is not submitted.

G. OTHER INFORMATION. Any other information which, in the opinion of the Community Development Department, will assist in determining whether the proposed project will be consistent with the purpose and intent of this Chapter. (Ord. 4269, 1984.)

28.78.050. *Acceptance of Reports.*

The housing and financial impact report, the relocation assistance plan, the notice of intent to convert, and other documents shall not be deemed filed until approved in writing by the Community Development Department. (Ord. 4269, 1984).

28.78.060. *Public Hearing.*

A. NOTICE OF INTENT. A notice of intent to convert the use of the park shall be delivered to each resident's dwelling unit a minimum of sixty (60) days prior to submittal of an application to convert the use. Evidence of delivery shall be submitted with the application for conversion. The form of the notice shall be as approved by the Community Development Department and shall inform the resident of the following:

1. Name and address of current owner;

2. Name and address of the applicant;

3. Approximate date on which the application for the conversion is to be filed;

4. Anticipated date on which the conversion permit is to be issued;

5. Approximate date on which the space is to be vacated by the resident;

6. Provisions for special cases;

7. Each resident will receive notice for each hearing and right to appear and be heard at any such hearing;

8. Each resident will receive a copy of the housing and financial impact report and relocation assistance program; and

9. Other information as may be deemed necessary by the Community Development Department.

B. RESIDENT NOTICE. Prior to the approval, the Planning Commission shall hold a public hearing. Notice of the hearing shall be mailed at least ten (10) days prior to the hearing date to the affected residents and conspicuously posted on the parcel. The public hearing notice shall describe the general nature of the application, and include notice of time and place of the public hearing, and notification of the residents' rights to attend and to be heard.

C. STAFF REPORT. Any report or recommendation on a proposed conversion of a mobilehome or permanent recreational vehicle park by the Staff to the Planning Commission shall be in writing and a copy shall be sent to the applicant and to each resident of the subject park at least three (3) days prior to any hearing or action on such conversion by the Planning Commission.

D. IMPACT REPORT AND RELOCATION ASSISTANCE PLAN. A copy of the housing and financial impact report and relocation assistance plan shall be delivered to each permanent resident, as defined in Section 28.78.040E, of the subject mobilehome or permanent recreational vehicle park by the applicant a minimum of fifteen (15) days prior to the public hearing and evidence of delivery shall be submitted to the Commuity Development Department. (Ord. 4269, 1984).

28.78.070 *Findings — Mobilehome and Permanent Recreational Vehicle Park Conversion Permit.*

The Planning Commission shall not approve an application for the conversion of a mobilehome or permanent recreational vehicle park unless the Planning Commission finds that:

A. All provisions of this Chapter are met and the issuance of the conversion permit will not be detrimental to the health, safety and general welfare of the City. In making this finding, the Planning Commission shall not consider the impact of the conversion on the City's affordable housing stock.

B. With respect to conversions of an existing park to a mobilehome or recreational vehicle subdivision, that the benefits to be derived from providing increased low-to-moderate cost home ownership opportunities outweigh the loss of rental housing opportunities.

C. In the case of conversion to condominiums, the proposed conversion will conform to the Santa Barbara Municipal Code in effect at the time of approval, except as otherwise provided in this Chapter.

D. The park owner has made reasonable efforts to prepare a relocation assistance program which (i) mitigates any significant adverse impact on the ability of displaced permanent mobilehome or permanent recreational vehicle park residents to find adequate space in a mobilehome or permanent recreational vehicle park, or (ii) in the event such a space is not available, provides other reasonable and comparable relocation assistance, and there are sufficient assurances that the measures in the program will be implemented.

E. In a park where the majority of permanent residents have incomes at or below low and moderate levels, as defined by the federal government and as established by the most recently filed federal income tax returns or some other document deemed acceptable by the Community Development Department, the Redevelopment Agency for the City of Santa Barbara has been offered the right to purchase the mobilehome or recreational vehicle park at fair market value, as determined by an indepen-

dent real property appraiser selected by the Agency, and has declined the offer or has failed to act on the offer within one hundred eighty (180) days of the park owner's mailing to the Agency a "Notice of Intent to Convert". This finding may be waived where the applicant can demonstrate, to the satisfaction of the Planning Commission or City Council on appeal, that the applicant has made reasonable efforts to obtain necessary income information from a majority of the permanent residents in the park and has been unable to do so.

F. The applicant has not engaged in coercive action toward the residents, such as an unreasonable rent increase, after submission of the first application for City review through the date of approval. In making this finding, consideration may be given to:

1. Rent increases at a rate greater than the rate of increase in the Consumer Price Index (Urban Wage Earners and Clerical Workers, Los Angeles-Long Beach-Anaheim Average, all items, as published by U.S. Bureau of Labor Statistics) unless provided for in leases or contracts in existence prior to the submittal of the first application for City review, and

2. Any other action by the applicant which is taken against residents to coerce them to refrain from opposing the issuance of the conversion permit including, but not limited to, any violation of Chapter 26.04 of this Code. An agreement with residents which provides for benefits to the residents after the approval shall not be considered coercive action.

G. That all notice requirements of the City and the state have been met.

H. All permanent buildings shall, on the date of change of use, be in compliance with the exit and occu-

pancy requirements and the height and area requirements for the type of construction and occupancy involved as required by the Uniform Building Code as adopted by the City of Santa Barbara and other applicable laws. (Ord. 4275, 1984; Ord. 4269, 1984; Ord. 3710, 1974, Ord. 2763, 1960; Ord. 2585, 1957.)

APPENDIX G

CHAPTER 2.5. MOBILEHOME RESIDENCY LAW

[SELECTED PROVISIONS]

§ 798. *Citation and application of chapter*

This chapter shall be known and may be cited as the Mobilehome Residency Law." It shall apply only to a mobilehome that requires a permit to be moved on a street or highway. *(Added by Stats.1978, c. 1035, § 4.)*

Former § 798, added by Stats.1978, c. 1031, § 1, was repealed by Stats.1978, c. 1033, § 1.5.

Sections 7 and 8 of Stats.1978, c. 1035, provide:

Amendment of § 798, added by Stats.1978, c. 1033, § 1, by § 1 of Stats.1978, c. 1033, failed to take effect under the terms of § 29 of that act.

§ 798.1. *Application of definitions*

Unless the provisions or context otherwise requires, the following definitions shall govern the construction of this chapter. *(Added by Stats.1978, c. 1031, § 1.)*

§ 798.2. *Management*

"Management" means the owner of a mobilehome park or an agent or representative authorized to act on his behalf in connection with matters relating to a tenancy in the park. *(Added by Stats.1978, c. 1031, § 1.)*

§ 798.3. *Mobilehome*

"Mobilehome" is a structure designed for human habitation and for being moved on a street or highway under permit pursuant to Section 35790 of the Vehicle

Code. Mobilehome includes a manufactured home, as defined in Section 18007 of the Health and Safety Code, and a mobilehome, as defined in Section 18008 of the Health and Safety Code, but does not include a recreational vehicle, as defined in Section 799.24 of this code and Section 18010 of the Health and Safety Code or a commercial coach as defined in Section 18001.8 of the Health and Safety Code. *(Added by Stats.1978, c. 1033, § 2. Amended by Stats.1980, c. 502, § 1; Stats.1982, c. 419, § 1; Stats.1983, c. 1124, § 1.)*

Section 57 of Stats.1983, c. 1124, provided:

"Sections 1 to 4, inclusive, and 11 to 51, inclusive, of this act shall become operative July 1, 1984. Sections 5 to 10, inclusive, and Sections 52 to 56, inclusive, of this act shall become operative January 1, 1984."

§ 798.4. *Mobilehome park*

"Mobilehome park" is an area of land where two or more mobilehome sites are rented, or held out for rent, to accommodate mobilehomes used for human habitation. *(Added by Stats.1978, c. 1031, § 1.)*

§ 798.5. *Renumbered § 798.6 and amended by Stats.1980, c. 502, § 5*

§ 798.6. *Park*

"Park" is a mobilehome park. *(Formerly § 798.5, added by Stats.1978, c. 1031, § 1. Renumbered § 798.6 and amended by Stats.1980, c. 502, § 5.)*

Former § 798.6 was renumbered § 798.8 and amended by Stats.1980, c. 502, § 6.

§ 798.7. *Renumbered § 798.10 and amended by Stats.1980, c. 502, § 7*

§ 798.8. *Rental agreement*

"Rental agreement" is an agreement between the management and the homeowner establishing the terms and conditions of a park tenancy. A lease is a rental agreement. *(Formerly § 798.6, added by Stats.1978, c. 1031, § 1. Renumbered § 798.8 and amended by Stats.1980, c. 502, § 6; Stats.1982, c. 1397, § 1.)*

Former § 798.8 was renumbered § 798.12 and amended by Stats.1980, c. 502, § 8.

§ 798.9. *Homeowner*

"Homeowner" is a person who has a tenancy in a mobilehome park under a rental agreement. *(Added by Stats.1978, c. 1031, § 1. Amended by Stats.1982, c. 1397, § 2.)*

§ 798.10. *Change of use*

"Change of use" means a use of the park for a purpose other than the rental, or the holding out for rent, of two or more mobilehome sites to accommodate mobilehomes used for human habitation, and does not mean the adoption, amendment, or repeal of a park rule or regulation. A change of use may affect an entire park or any portion thereof. "Change of use" includes, but is not limited to, a change of the park or any portion thereof to a condominium, stock cooperative, planned unit development, or any form of ownership wherein spaces within the park are to be sold. *(Added by Stats.1979, c. 945, § 1. Amended by Stats.1980, c. 137, § 1.)*

Another § 798.10 was renumbered § 798.11 and amended by Stats.1981, c. 714, § 50.

§ 798.11. *Resident*

"Resident" is a homeowner or other person who lawfully occupies a mobilehome. *(Formerly § 798.7, added by Stats.1978, c. 1031, § 1. Renumbered § 798.10 and amended by Stats.1980, c. 502, § 7. Renumbered § 798.11 and amended by Stats.1981, c. 714, § 50; Stats.1982, c. 1397, § 3.)*

§ 798.12. *Tenancy*

"Tenancy" is the right of a homeowner to the use of a site within a mobilehome park on which to locate, maintain, and occupy a mobilehome, site improvements, and accessory structures for human habitation, including the use of the services and facilities of the park. *(Formerly § 798.8, added by Stats.1978, c. 1031, § 1. Renumbered § 798.12 and amended by Stats.1980, c. 502, § 8; Stats.1982, c. 1397, § 4.)*

ARTICLE 2. RENTAL AGREEMENT

Section

798.15. Writing; required contents.
798.16. Inclusion of other provisions.
798.17. Rental agreements exempt from local measures establishing maximum rent; gifts for executing rental agreements.
798.18. Term; comparable monthly charges for one year as for month-to-month tenancy.
798.19. Waiver of rights; public policy.
798.20. Discrimination.
798.22. Recreational vehicles in mobilehome parks; designated areas.

§ 798.15. *Writing; required contents*

The rental agreement shall be in writing and shall contain, in addition to the provisions otherwise required by law to be included, all of the following:

(a) The term of the tenancy and the rent therefor.

(b) The rules and regulations of the park.

(c) The language of the provisions of this chapter. A copy of the text of this chapter attached as an exhibit shall be deemed to satisfy the requirements of this section.

(d) A provision specifying that it is the responsibility of the management to provide and maintain physical improvements in the common facilities in good working order and condition.

(e) A description of the physical improvements to be provided the homeowner during his or her tenancy.

(f) A provision listing those services which will be provided at the time the rental agreement is executed and will continue to be offered for the term of tenancy and the fees, if any, to be charged for those services.

(g) A provision stating that management may charge a reasonable fee for services relating to the maintenance of the land and premises upon which a mobilehome is situated in the event the homeowner fails to maintain such land or premises in accordance with the rules and regulations of the park after written notification to the homeowner and the failure of the homeowner to comply within 14 days. The written notice shall state the specific condition to be corrected and an estimate of the charges to be im-

posed by management if the services are performed by management or its agent.

(h) All other provisions governing the tenancy. *(Added by Stats.1978, c. 1031, § 1. Amended by Stats.1978, c. 1033, § 4; Stats.1980, c. 137, § 2; Stats.1981, c. 667, § 1; Stats.1982, c. 1397, § 5; Stats.1983, c. 519, § 1.)*

§ 798.18. *Term; comparable monthly charges for one year as for month-to-month tenancy*

(a) A homeowner shall be offered a rental agreement for (1) a term of 12 months, or (2) a lesser period as the homeowner may request, or (3) a longer period as mutually agreed upon by both the homeowner and management.

(b) No such agreement shall contain any terms or conditions with respect to charges for rent, utilities, or incidental reasonable service charges that would be different during the first 12 months of the agreement from the corresponding terms or conditions that would be offered to the homeowners on a month-to-month basis. *(Added by Stats.1978, c. 1031, § 1. Amended by Stats.1978, c. 1032, § 2; Stats.1978, c. 1033, § 7.5; Stats.1980, c. 206, § 1; Stats.1981, c. 667, § 4; Stats.1982, c. 1397, § 6.)*

Amendment of this section by § 7 of Stats.1978, c. 1033, failed to take effect under the terms of § 31 of that act.

Section 3 of Stats.1978, c. 1032, provided:

"Section 2 of this act shall become operative only if Senate Bill No. 2119 [Stats.1978, c. 1031] of the 1977-78 Regular Session is enacted and adds Section 798.18 to the Civil Code [Section 798.18 was so added], in which case Section 1 of this act shall not become operative."

ARTICLE 6. TERMINATION OF TENANCY

Section

798.55. Protection from actual or constructive eviction; termination or refusal to renew; reasons; notice; time.
798.56. Authorized reasons for termination.
798.57. Statement of reasons in notice.
798.58. Termination to make space for buyer of mobilehome from park owner prohibited.
798.59. Notice by homeowner; time.
798.60. Application of other laws.
798.61. Abandoned mobilehomes; definition; determination; notice; petition for declaration of abandonment; hearing; judgment; redemption; inventory; notice of intent to sell; storage costs; public sale; accounting; title.

§ 798.55. *Protection from actual or constructive eviction; termination or refusal to renew; reasons; notice; time*

(a) The Legislature finds and declares that, because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter.

(b) The management shall not terminate or refuse to renew a tenancy, except for a reason specified in this article and upon the giving of written notice to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure, to remove the mobilehome from the park within a period of not less than 60 days, which period shall be specified in the notice. A copy of

this notice shall be sent to the legal owner, as defined in Section 18005.8 of the Health and Safety Code, each junior lienholder, as defined in Section 18005.3 of the Health and Safety Code, and the registered owner of the mobilehome, if other than the homeowner, by United States mail within 10 days after notice to the homeowner, addressed to the legal owner, each junior lienholder, and the registered owner at their addresses, as set forth in the registration card specified in Section 18091.5 of the Health and Safety Code. *(Added by Stats.1978, c. 1031, § 1. Amended by Stats.1978, c. 1033, § 13; Stats.1979, c. 493, § 1; Stats.1980, c. 1149, § 4; Stats.1982, c. 1397, § 24; Stats.1983, c. 519, § 7; Stats.1983, c. 1124, § 2.)*

Cross References

Change of use of the park, notice specified in this section to be given after lapse of 12-month period and after required permits have been obtained, see § 798.56.

Forcible entry and unlawful detainer actions, effect of this section, see § 798.60.

Recreational vehicle park tenants, notice to remove vehicle, see § 799.45.

§ 798.56. *Authorized reasons for termination*

A tenancy shall be terminated by the management only for one or more of the following reasons:

(a) Failure of the homeowner or resident to comply with a local ordinance or state law or regulation relating to mobilehomes within a reasonable time after the homeowner receives a notice of noncompliance from the appropriate governmental agency.

(b) Conduct by the homeowner or resident, upon the park premises, which constitutes a substantial annoyance to other homeowners or residents.

(c) Failure of the homeowner or resident to comply with a reasonable rule or regulation of the park as set forth in the rental agreement or any amendment thereto.

No act or omission of the homeowner or resident shall constitute such a failure to comply unless and until the management has given the homeowner written notice of the alleged rule or regulation violation and the homeowner or resident has failed to adhere to the rule or regulation within seven days. However, if a homeowner has been given a written notice of an alleged violation of the same rule or regulation on three or more occasions within a 12-month period after the homeowner or resident has violated that rule or regulation, no written notice shall be required for a subsequent violation of the same rule or regulation.

Nothing in this subdivision shall relieve the management from its obligation to demonstrate that a rule or regulation has in fact been violated.

(d) Nonpayment of rent, utility charges, or reasonable incidental service charges; provided, that the homeowner shall be given a three-day written notice to pay the amount due or to vacate the tenancy. The three-day written notice shall be given to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure. Such notice may be given at the same time as the 60 days' notice required for termination of the tenancy. Payment by the homeowner prior to the expiration of the three-day notice period, or payment by the legal owner, as defined in Section 18005.8 of the Health and Safety Code, any junior lienholder, as defined in Section 18005.3 of the Health and Safety Code, or the registered

owner, as defined in Section 18009.5 of the Health and Safety Code, if other than the homeowner, on behalf of the homeowner prior to the expiration of 30 calendar days following the mailing of the notice to the legal owner, each junior lienholder, and the registered owner provided in subdivision (b) of Section 798.55, shall cure a default under this subdivision with respect to such payment. The homeowner shall remain liable for all payments due up until the time the tenancy is vacated. Cure of a default of rent, utility charges, or reasonable incidental service charges by the legal owner, any junior lienholder, or the registered owner, if other than the homeowner, as provided by this subdivision, may not be exercised more than twice during the term of the tenancy.

(e) Condemnation of the park.

(f) Change of use of the park or any portion thereof, provided:

(1) The management gives the homeowners at least 15 days' written notice that the management will be appearing before a local governmental board, commission, or body to request permits for a change of use of the mobilehome park.

(2) After all required permits requesting a change of use have been approved by the local governmental board, commission, or body, the management shall give the homeowners six months' or more written notice of termination of tenancy.

If the change of use requires no local governmental permits, then notice shall be given 12 months or more prior to the management's determination that a change of use will occur. The management in the notice shall disclose and describe in detail the nature of the change of use.

(3) The management gives each proposed homeowner written notice thereof prior to the inception of his or her tenancy that the management is requesting a change of use before local governmental bodies or that a change of use request has been granted.

(4) The notice requirements for termination of tenancy set forth in Sections 798.56 and 798.57 shall be followed if the proposed change actually occurs.

(5) A notice of a proposed change of use given prior to January 1, 1980, which conforms to the requirements in effect at that time shall be valid. The requirements for a notice of a proposed change of use imposed by this subdivision shall be governed by the law in effect at the time the notice was given. *(Added by Stats.1978, c. 1031, § 1. Amended by Stats.1978, c. 1033, § 14; Stats.1979, c. 945, § 2; Stats.1979, c. 1185, § 1.5; Stats. 1980, c. 1149, § 5; Stats.1981, c. 714, § 52; Stats.1981, c. 458, § 1; Stats.1982, c. 777, § 1; Stats.1982, c. 1397, § 25.5; Stats.1983, c. 519, § 8; Stats.1983, c. 1124, § 3.)*

Subordination of amendment by Stats.1981, c. 714 to other amendments during the 1981 portion of the 1981-82 Regular Session which are effective on or before Jan. 1, 1982, see note under § 25.8.

Cross References

Forcible entry and unlawful detainer actions, effect of this section, see § 798.60.

§ 798.57. *Statement of reasons in notice*

The management shall set forth in a notice of termination, the reason relied upon for the termination with specific facts to permit determination of the date, place, witnesses, and circumstances concerning that reason.

Neither reference to the section number or a subdivision thereof, nor a recital of the language of this article will constitute compliance with this section. *(Added by Stats.1978, c. 1031, § 1.)*

Cross References

Forcible entry and unlawful detainer actions, effect of this section, see § 798.60.

§ 798.58. *Termination to make space for buyer of mobilehome from park owner prohibited*

No tenancy shall be terminated for the purpose of making a homeowner's site available for a person who purchased a mobilehome from the owner of the park or his agent. *(Added by Stats.1978, c. 1031, § 1. Amended by Stats.1982, c. 1397, § 26.)*

§ 798.59. *Notice by homeowner; time*

A homeowner shall give written notice to the management of not less than 60 days before vacating his or her tenancy. *(Added by Stats.1978, c. 1031, § 1. Amended by Stats.1982, c. 1397, § 27.)*

§ 798.73 *Removal upon sale to third party; conditions*

The management shall not require the removal of a mobilehome from the park in the event of its sale to a third party during the term of the homeowner's rental agreement. However, in the event of a sale to a third party, in order to upgrade the quality of the park, the managment may require that a mobilehome be removed from the park where:

(a) It is less than 10 feet wide.

(b) It is more than 20 years old, or more than 25 years old if manufactured after September 15, 1971,

and is 20 feet wide or more and the mobilehome does not comply with the health and safety standards provided in Sections 18550, 18552, and 18605 of the Health and Safety Code, and the regulations established thereunder.

(c) The mobilehome is more than 17 years old, or more than 25 years old if manufactured after September 15, 1971, and is less than 20 feet wide and the mobilehome does not comply with the construction and safety standards under Sections 18550, 18552, and 18605 of the Health and Safety Code, and the regulations established thereunder.

(d) It is in a significantly rundown condition or in disrepair, as determined by the general condition of the mobilehome and its acceptability to the health and safety of the occupants and to the public, exclusive of its age. The management shall use reasonable discretion in determining the general condition of the mobilehome and its accessory structures. The management shall bear the burden of demonstrating that the mobilehome is in a significantly rundown condition or in disrepair. (*Added by Stats.1978, c. 1034, § 2. Amended by Stats.1982, c. 1392, § 1; Stats.1982, c. 1397, § 30.5)*

Amendment of § 798.73 (added by Stats.1978, c. 1031, § 1) by Stats.1978, c. 1033, § 18 was inoperative under § 8 of Stats.1978, c. 1034, § 3.

§ 798.74 *Prior approval of purchaser; grounds for withholding; financial report or credit rating; fee; credit or refund*

(a) The management may require the right of prior approval of a purchaser of a mobilehome that will remain in the park and that the selling homeowner or his or her agent give notice of the sale to the management before the

close of the sale. Approval cannot be withheld if the purchaser has the financial ability to pay the rent and charges of the park unless the management reasonably determines that, based on the puchaser's prior tenancies, he or she will not comply with the rules and regulations of the park. If the ownership or management rejects a purchaser as a prospective homeowner, the ownership or management shall inform the selling homeowner in writing of its reasons for the rejection.

(b) If the management collects a fee or charge from a prospective purchaser of a mobilehome in order to obtain a financial report or credit rating, the full amount of the fee or charge shall be credited toward payment of the first month's rent for that mobilehome purchaser. If, for whatever reason, the prospective purchaser is rejected by the management, the management shall refund to the prospective purchaser the full amount of that fee or charge within 30 days from the date of rejection. If the prospective purchaser is approved by the management, but, for whatever reason, the prospective purchaser elects not to purchase the mobilehome, the management may retain the fee, or a portion thereof, to defray its administrative costs under this section. *(Added by Stats.1978, c. 541, § 2; Stats.1978, c. 1031, § 18. Amended by Stats.1982, c. 1397, § 31; Stats.1985, c. 76, § 1.)*

Text of section added by Stats.1978, c. 541, § 2 and by Stats.1978, c. 1031, § 18 was identical except for the word "that" preceding "the selling agent" in the first sentence was inserted into Stats.1978, c. 1031, § 18.

Addition of §§ 789.74 by Stats.1978, c. 1031, § 1 was inoperative under the terms of § 20 of that Act.

§ 798.75 *Sale or transfer of mobilehome to remain in park; required documents*

An escrow, sale, or transfer agreement involving a mobilehome located in a park at the time of the sale, where the mobilehome is to remain in the park, shall contain a provision signed by the purchaser stating that, by such signature he or she has agreed to the terms of a rental agreement. A copy of a fully executed rental agreement signed by both the purchaser and park management will satisfy the requirements of this section. In the event the purchaser fails to execute the rental agreement, the purchaser shall not have any rights of tenancy. ***(Added Stats. 1978, c. 1031, § 1. Amended by Stats.1981, c. 667, § 8; Stats. 1983, c. 519, § 9.)***

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On August 3, 1987, I served the within Petition for Writ of Certiorari in re: "City of Santa Barbara vs. Williams C. Hall and Jean G. Hall" in the United States Supreme Court, October Term 1987, No. .....;

On the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Sherman I. Stacey
1299 Ocean Avenue, Suite 313
Santa Monica, California 90401

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on August 3, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

MOTION FILE
AUG 3 1987

87-220

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

CITY OF SANTA BARBARA,

Petitioner,

v.

WILLIAMS C. HALL, and
JEAN G. HALL,

Respondents.

No. —

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION OF GOLDEN STATE MOBILHOME OWNERS LEAGUE, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE

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EDITOR'S NOTE

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Pursuant to Rule 42(3) of the Rules of this Court, Golden State Mobilehome Owners League, Inc. respectfully moves the Court for leave to file a brief amicus curiae in the above entitled case. Counsel for petitioner has granted consent; the respondents have refused to consent.

INTEREST OF GOLDEN STATE MOBILHOME OWNERS LEAGUE,INC.

Golden State Mobilhome Owners League, Inc. ("League") is an organization composed of mobilehome and manufactured home owners. Founded 25 years ago, it represents more than 200,000 persons living in 100,000 manufactured homes in the State of California, making it one of the oldest and largest non-profit homeowners organizations in the United States.

To date in this matter the homeowners have had no voice at all. The residents in Respondents' park were not even aware of this action until the Court of Appeals decision was published, according to members and officers of the League in that area. It is indicative of Respondents' attempt to deny their residents any input that even consent to file this brief on their behalf was denied, when requested by this counsel.

It is documented by state records of sales that more than one million mobile and manufactured homes are occupied as permanent residences in the State of California today, with about 40% of them located on rented or leased sites, often in "parks". The homeowners, with investments in home, accessory structures and landscaping totaling $25,000 to $75,000 each, are peculiarly at the mercy of the park owners. The larger size homes, common in recent years, are nearly as expensive to move as site-built buildings and there are few available spaces for them to relocate. Restrictive zoning and denial of permits for construction of new parks have resulted in vacancy factors of less than 2% in most urban areas. The lack of spaces has caused the value of lands developed as parks and hence, their rental rates, to be artificially high.[1] Therefore, the League has a very real and direct interest in the instant case since it has been in support of local ordinances regulating the rate of rent increases.

The substantial and far-reaching consequences this decision of the Ninth Circuit may have on all methods of rent restriction are already quite evident. Owners of park after park are giving notices of rent increases in excess of previous limits, daring the residents to

1. See generally *Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside,* (1984) 157 Cal.App.3d 887, 900.

object or file suits which will give the landowners excuse to challenge the ordinances. The League is extremely concerned that as a result of this decision the fifty-six jurisdictions in California which have to date passed rent ordinances may be subjected to massive lawsuits, necessitating the expenditure of thousands of dollars in tax monies to defend. Three such suits have already been filed to this writer's knowledge and are particularly burdensome for small towns to defend. Thus, all taxpayers are being affected, not just mobilehome owners.

Further, the League has a direct interest in the clarification by this Court of the line constituting a "taking" under the Bill of Rights since its staff and counsel are frequently called upon for input to assist state and local elected and appointed officials. League representatives over the years have attended thousands of meetings of legislative, county and municipal committees to support passage of fair laws to create and maintain the mobilehome/manufactured home lifestyle. That history of participation makes the League uniquely able to present to this Court the many, but sometimes hard to locate, mobilehome laws which it feels have a direct bearing in the instant matter.

CONCLUSION

For the above stated reasons, Golden State Mobilhome Owners League, Inc. respectfully requests that the Court grant this motion for leave to file the accompanying Amicus Curiae brief in support of the position of the petitioner.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I, PATRICEA L. DEAN, the attorney for Golden State Mobilhome Owners League, Inc., Amicus Curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 3, 1987, I served copies of the foregoing MOTION OF GOLDEN STATE MOBILHOME OWNERS LEAGUE, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF OF AMICUS CURIAE on the several parties thereto, as follows:

1. On the City of Santa Barbara, Petitioner, by mailing three copies in a duly addressed envelope, with first-class postage prepaid, to its attorney of record, Steven A. Amerikaner, City Attorney, Post Office Drawer P-P, Santa Barbara, California 93102.

2. On Williams C. Hall and Jean G. Hall, Respondents, by mailing three copies in a duly addressed envelope, with first-class postage prepaid, to their attorney, Sherman L. Stacy, Esq. 1299 Ocean Avenue, Suite 313, Santa Monica, California 90401.

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INDEX

	Page
INDEX	4
TABLE OF CASES	5
TABLE OF STATUTES	5
ARGUMENT	7
INTRODUCTION	7
I. FAILURE TO UNDERSTAND EXACTLY WHAT TYPE OF HOUSING UNIT IS IN ISSUE OR THE PROPER TERMINOLOGY CAN LEAD TO MISTAKES OF FACT.	8
II. THE COURT'S CONCLUSIONS OF THE OPERATIVE EFFECT OF THE ORDINANCE FAIL TO TAKE NOTICE OF STATE LAW.	10
III. PLAINTIFFS' ALLEGATIONS SHOULD NOT BE TAKEN AT FULL VALUE IF CONTRARY TO LAW.	12
IV. REQUIREMENTS TO MAKE HOUSING A TOP PRIORITY CONSTITUTE A LEGITIMATE STATE INTEREST.	13
CONCLUSION	14
APPENDIX	
1-SANTA BARBARA MUNICIPAL CODE, TITLE 26, Chapters 26.04, 26.08	
2-Amended Decision Herein (1987) (typed copy from U.S. Court of Appeals for the Ninth Circuit)	

TABLE OF CASES

Troy, Ltd. v. Renna, (1984) 727 F.2d 287 9

TABLE OF STATUTES

FEDERAL

42 U.S.C.A. §5401, et seq. 7

42 U.S.C.A. §5402 (6) 8

CALIFORNIA
(All references are to current volumes of West's & Supp. '87)

Civil Code
§789.8 10
§798.15 10
§798.18 10
§798.25 11
§798.55(a) 7
§798.56 10, 13
§798.59 10
§798.73 12
§798.74 11
§798.75 11
§798.76 11
§799.20 7

Civil Procedure Code §704.910 8

TABLE OF STATUES
(continued)

Government Code
- §65580, et seq. 9
- §65580(a) 13
- §65590 13
- §65852.3 7

Health & Safety Code
- §18000, et seq. 7
- §18007 8
- §18008 8
- §18075.5(a) 8
- §18200, et seq. 7
- §18211 8
- §18250 7

Revenue & Taxation Code
- §5800, et seq. 9
- §5801 8, 9
- §5810 9

ARGUMENT

INTRODUCTION

The people of the nation, desperate for shelter during World War II, discovered "trailers" and increased demand after the war caused the creation of a whole new industry - mobile housing. There has never been a particular area of law where this new creation could be pigeon-holed. This sometimes-mobile, sometimes-stationary housing which is usually personalty but may be realty has had to carve its place between areas of law until it seems, like Topsy, to have "just growed." Some knowledge of its history and background are necessary to understand its present position and problems.

The State of California in the mid-1950's was one of the first to establish codes of building standards for such housing[1] and for site development.[2] In 1969 California, along with other states, began to recognize that the rights of mobilehome owners were greater than those of other types of "renters" so the first of the Mobilehome Residency Laws[3] was enacted. Also the widening gap between mobilehomes (now given recognition as a type and spelled as a single word) and recreational trailers ("RV's") was emphasized with the passage of the Recreational Vehicle Park Occupancy Act[4] and continuing amendments which kept enlarging the differences between the two parts of the industry.

Design improvements, improved materials and particularly the affordable price of mobilehomes during the Seventies, when inflation skyrocketed the price of site-built homes, brought ever-increasing numbers of buyers and made necessary the development of a national building standard. In 1974 Congress enacted the National Mobilehome Construction and Safety Standards Act, later amended to the National Manufactured Home Construction and Safety Standards Act.[5] Considered by many engineers to be comparable to the Uniform Building Code or the Southern Building Code, the code promulgated by the Department of Housing and Urban Development (the "HUD Code") became effective in 1976 and all mobile/manufactured homes built since June 15, 1976 are constructed to the new standards, which led to R-1 zoning under California Government Code §65852.3

The problems that have consistently plagued the industry, the governments, the courts and the manufactured home owners since that date have been aggravated by a combination of "poor image" and "confusing terminology."

I

FAILURE TO UNDERSTAND EXACTLY WHAT TYPE OF HOUSING UNIT IS IN ISSUE OR THE PROPER TERMINOLOGY CAN LEAD TO MISTAKES OF FACT

The manufactured housing industry and the law have been hard put to devise terminology and definitions for this relatively new creation of technology. For example, the difference between a mobilehome (one built to state standards before 1976) and a manufactured *home* (one built to the HUD Code) and a manufactured *house,* also called a "modular," (one built to the Uniform Building Code designed for a permanent foundation only) might be absolutely crucial in trying to interpret a zoning ordinance.

Similarly, knowing a mobilehome/manufactured home is a "structure" under both federal[6] and state[7] laws, can be homesteaded[8] and is no longer exempt from a real estate type tax[9] would be necessary to properly interpret the provisions of the Santa Barbara ordinance at issue.

Unfortunately, the Court herein in the detailing of Facts[10] provides an example of the mistakes of law and fact which can occur. In the first paragraph,[10] and throughout the statement of facts and the entire opinion, the use of the word "tenant" seems to indicate a lack of understanding of the estate held by a mobilehome owner. More than five years ago the California legislature decreed the term "resident" to be used in the Residency Law as expression of an estate greater than a simple rental tenancy.

In the second paragraph of Facts,[10] the Court speaks of "motor vehicle license plates," but the cited section of the Vehicle Code does not apply to mobile/manufactured homes at all, only to

RV's.[11] Also in the second paragraph, §5810 (Cal. Rev. & Tax. Code §5800, et seq.) is misstated in that, when read with §§5800 and 5801, it is clear mobilehomes *are* taxed as if real property and are not exempt.

Therefore, it seems these mistakes would not have occurred unless the panel had the image or "mindset" that they were dealing with "trailers" which were licensed and taxed like motor vehicles and occupying transient rented spaces. That mistake of "image" is evident throughout the opinion and taints the decision with additional confusion. It is probable that the same mistake accounts for the Court's acceptance of the argument that the Kelley Blue Book "Like the similar blue book for automobiles"[12] is the standard reference for prices. That reference is only applicable to the *home* itself and takes into consideration the age, manufacturer and model. It fails to recognize any value for accessories, (the skirting around the base, carports, porches, patios, storage buildings, etc.) which may be minimal at only $8000 to $10000, or may involve full mortored-stone bases, poured concrete porches and steps, and site-built garages at a cost of $40,000 to $50,000. Similarly, it provides no assistance in the consideration of location . . . location in the sense of on the desert in Palmdale or near the beach in Santa Barbara, or in the "old, bad" part of a town or in the "newer, good" part of a popular city. Therefore, a blue book value of $30,000 for a home is only the starting point to determine its sales value. The market for housing in general in the area must also be considered. Housing in Santa Barbara is at a premium averaging more than $120,000, so a manufactured home in that area selling at $60,000 to $80,000 is considered a bargain with no weight given to rent control at all.

It is likely that the same mistake of "image" led to the Court's almost summarily dismissing the statement of findings and purpose in the ordinance[13] without recognizing the City Council's authorization and duty to make such perceptions.[14]

It is well established that a state is justified in declaring "a broad remedial purpose in protecting the mental and physical health of citizens who could suffer greatly by evictions."[15] In the instant matter the state and city, in declaring protection for the economic health of the citizens as well, have found the protected estate of the manufactured home owner necessary to prevent the

disastrous consequences of either actual eviction without just cause or economic eviction by uncontrolled and massive site rent increases.

II

THE COURT'S CONCLUSIONS ON THE OPERATIVE EFFECT OF THE ORDINANCE FAIL TO TAKE NOTICE OF STATE LAW.

The Court appears to conclude[16] the *ordinance* is solely responsible for requirements there must be offered "a lease, a recognized estate in land," without considering that "A lease is a rental agreement." (Cal. Civ. Code §798.8) which "shall be in writing" with specific provisions including a term (id. at §798.15) and manditorily must be offered to the homeowner (id. at §798.18). Further, the Court details other requirements[17] such as "terminable by the resident at will" (see id. at §798.59) "but by the parkowner only for cause, narrowly defined in the ordinance" without apparent regard for statutory provisions. (id. at §798.56 (a) through (f)(5).) In other words, the ordinance does not expand in any way the estate of the resident declared and granted by the legislature years ago which statutes are not under attack herein! The Court ignores the fact that plaintiffs made the choice to use their land as a mobilehome park knowing of the substantial rights of the residents that would apply under these state laws already then in existence.

The Court continues,[18] "lasting indefinitely" and having "a market value"[19] without taking notice, it seems, of the ban against unilateral assignment on the face of the ordinance[20] which effectively prevents the resident from taking any benefit from the gift or sale of the "estate" without the express agreement of the parkowner. More importantly, the Court apparently failed to note that the estate is terminable by the parkowner under both the ordinance[21] and statute (Civ.Code §798.56 c.) for failure to obey "rules and regulations of the park" which may be, and usually are

unilaterally imposed, strengthened and modified by the parkowner over all objections of the residents simply by giving of the required six months' notice. (id. at §798.25) Therefore, it may be seen that the so-called estate of the resident can be somewhat illusory under some parkowners. The ordinance and even the statutes give only a surface sheen which tends to conceal the possibilities for harassment, deliberate infliction of stress and threats, and perpetration of unfair business practices against the residents once they are "locked in place" by the lack of available spaces and the approximate expense of $10,000 to $12.000 to disassemble, move and reinstall a double-section home even a short distance. It is a situation which is giving rise to an ever-increasing number of actions in state courts,[22] which, it might be assumed, the city herein hoped to defuse by providing for leases requiring some arbitration.

The Court then concludes the landlord "loses practically all right to decide who occupies the property, and on what terms."[23] and that the homeowner "is given an economic interest in the land that he can use, sell, or give away at his pleasure; . . . to keep or use, whether or not he continues to be a tenant."[24] This writer can find no legal basis for either argument. To make such conclusions one must ignore at least two provisions of the subject ordinance and four statutory restrictions. Under the ordinance the parkowner need only deny assignment[25] to invoke all his statutory rights to a satisfactory credit statement and determination that the occupant has the ability to pay rent (Cal. Civ. Code §798.74); will comply with the rules (id. at §798.74) including any barring children (id. at §798.76); and executes a rental agreement with whatever terms, other than the rental rate as increased upon transfer,[26] the parkowner demands (id. at §798.75) since neither the protections of the ordinance nor the Residency Law in the Civil Code are available to a new buyer not yet living in the park. Both documents fail to define or provide for this person who is not yet either a "homeowner" or "resident." The prospective purchaser is faced with a take-it-or-leave-it situation which usually results in a loss of the sale to the homeowner's detriment but no loss of revenue to the parkowner.

For all the above reasons, to conclude "the tenant alone decides who will be his successor" and "the landlord has no meaningful say as to who will live on the property"[27] is a travesty.

III

PLAINTIFFS' ALLEGATIONS SHOULD NOT BE TAKEN AT FULL VALUE IF CONTRARY TO LAW.

A standard rule of procedure requires a reviewing court to assume all of plaintiffs' allegations are true. However, this writer has been unable to find any authority whatsoever that the Court must give full consideration to an allegation that is contrary to law. For example, to take an allegation which the Court itself cites,[28] "this interest consists of the right to occupy the property in perpetuity . . . " is very hard to justify. As noted above, the ordinance itself provides the leases shall not be assignable without the express permission of the parkowner. Therefore, the right to occupy may not be willed, nor given away, nor indeed sold wthout the consent of the parkowner. Further, under statutory law specifically included in the municipal code,[29] as soon as the home is 25 years old and fails to pass inspection or if it is in disrepair or in "significantly rundown condition" regardless of age the parkowner does not have to consent to any transfer of the home whatsoever.[30] Thus, an allegation of an estate "in perpetuity" appears to be contrary to law.

It should also be noted that the resident has no right to request a transfer of the occupancy rights *without the home.* All of his occupancy rights arise from his substantial investment in the home, accessories and landscaping which he has installed on the property. It is the investment which he is putting on the market, not just the right to occupy. The total investment by the 71 residents in their homes, accessories and landscaping on the surface of the property probably exceeds the total investment the parkowners have in the land since that pattern has been established over and over in hearings and trials.

Again it appears the Court has confused the terminology or failed to take notice of the substantial differences in the "residency" rights of a manufactured home owner as compared to the type of apartment rentals which are the usual concern in a rent control matter.[31] The listing of prerogatives which apply to the

"ordinary" rentals of housing help point out the differences the Court should have been considering herein. Most of the parks have written rules already in place regulating whether pets are allowed, establishing the park as either "family", "adult", or "senior", usually limiting two residents per home and making the resident responsible for all landscaping. Therefore, there are few improvements possible on a bare lot which could increase rents and if the resident is a "slovenly beer-drinker" he can be evicted.[32]

IV

REQUIREMENTS TO MAKE HOUSING A TOP PRIORITY CONSTITUTE A LEGITIMATE STATE INTEREST

The ever-increasing numbers of homeless in California, among them being whole families, have caused national headlines. Years ago the legislature declared "the availability of housing is of vital statewide importance" and "a priority of the highest order."[33] Additionally, even more strigent requirements have been determined for local governments within the coastal zone, to preserve, protect and replace low-income and moderate-income housing.[34] As previously noted herein, mobilehomes at $60,000 qualify as moderate and/or affordable housing in areas such as California's coastal zone where the average selling price of site-built homes is $10,000 to $20,000 more than the average for the rest of the state, that is, in the $120,000-130,000 range or more. The City Council, after investigations by staff and public hearings, duly found "a critical shortage of low and moderate income housing" in their area, and that the parks for mobilehomes and recreational vehicles "are a significant part of the remaining supply."[35] The Council recognized the economic burden on the homeowners[36] but insisted the parkowners have a "fair return on their investment."[37] The ordinance makes arbitration of the lease terms themselves binding[38] but says the arbitration provision of the leases only includes those items, besides rent increases in excess of the ordinance, "which the *parties agree* to subject to arbitration."[39] When viewed in connection with the stated purposes of the directives for a housing element by the legislature and with the details of the

California Mobilehome Residency Law, the Council actually has developed a scheme of action which has given weight to the requirements of all concerned in the forwarding of not only a legitimate but critical state purpose.

CONCLUSION

The Golden State Mobilhome Owners League, Inc. concurs in the statement of jurisdiction, the questions presented and, generally, with the argument advanced by the City of Santa Barbara in its petition herein. However, beyond those points the League believes the Court below failed to take the time to adequately study and understand the special legal problems presented by this type of housing.

The League respectfully submits the Court below, once it decided to ignore the "ripeness" issue, had the opportunity to review the "novel" differences presented by manufactured homes to traditional concepts in law and instead chose to ignore those differences in favor of developing its own "novel" concept of the tradition itself.

The League respectfully requests this Court grant the petition for writ of certiorari in view of the many conflicts in this decision between both state laws and federal decisions.

Respectfully submitted,

PATRICEA L. DEAN
Attorney for Amici Curiae
Golden State Mobilhome Owners
League, Inc.

FOOTNOTES

1. Currently at Cal. Health & Safety Code §18000, et seq.
2. Currently at Cal. Health & Safety Code §18200, et seq.
3. See legislative declarations of need for special protections in Cal. Health & Safety Code §18250 and Cal. Civ. Code §798, et seq., particularly §798.55(a).
4. Cal. Civil Code §799.20, et seq.
5. 42 U.S.C. §5401, et seq.
6. 42 U.S.C.A. §5402(6)
7. Cal. Health & Safety Code §18007, 18008, and 18211
8. Cal. Civ. Proc. Code §704.910
9. Cal. Health & Safety Code §18075.5 (a); See also Cal. Rev. & Tax. Code §5801
10. Amended decision herein, (1987) --- F.2d ---, typed copy attached as Appendix 2, Facts at pg. 2.
11. Vehicle Code has not applied to mobilehomes since 1981.
12. App. 2, pg. 4, note 5
13. App. 1, pg. 2, §26.08.020 A through D
14. See Cal. Govt. Code 65580, et seq.
15. *Troy Ltd. v. Renna,* (1984) 727 F.2d 287, 298.
16. App. 2, pg. 2, ln. 24; also pg. 3, ln. 9; also pg. 10, lns. 4 & 5.
17. App. 2, pg. 3, lns. 1 & 2
18. App. 2, pg. 10, ln. 6; also pg. 11, lns.1-4.
19. App. 2, pg. 10, lns. 14-26 through pg. 11, ln. 7 together with pgs. 15-17 mentioned therein.
20. App. 1, pg. 7, §26.08.040 E.
21. App. 1, pg. 4, §26.08.040 A3
22. To this author's knowledge, more than thirty cases have been filed in the state courts alleging these causes of action against parkowners.
23. App. 2, pg. 10, lns. 7-9.
24. App. 2, pg. 11, lns. 1-4.
25. App. 1, pg. 7, §26.08.040 E.
26. App. 1, pg. 8, §26.08.060.
27. App. 2, pg.10, lns. 9-12.
28. App. 2, pg. 9, ln. 9.
29. App. 1. pg. 1, §26.04.010.
30. Cal. Civ. Code §798.73.

FOOTNOTES

Continued

31. App. 2, pg. 16, ln. 12 through pg. 17, ln. 4.
32. Cal. Civ. Code §798.56b.
33. Cal. Govt. Code §65580(a).
34. Cal. Govt. Code §65590, et seq.
35. App. 1, pg. 2, §26.08.020 A & B
36. App. 1, pg. 2, §26.08.020 C
37. App. 1, pg. 2, §26.08.020 D
38. App. 1, pg. 7, §26.08.050 C
39. App. 1, pg. 5, §26.08.040 D ii.

APPENDIX

TITLE 26

HOUSING REGULATIONS

Chapter: 26.04 Mobilehome and Recreational Vehicle Parks-Resident Rights

Chapter: 26.08 Mobilehome and Recreational Vehicle Park Lease Regulations

Chapter 26.04

MOBILEHOME AND RECREATIONAL VEHICLE PARKS - RESIDENT RIGHTS

Sections:

26.04.010 Mobilehome and Recreational Vehicle Parks-Residents Rights.

26.04.010 Mobilehome and Recreational Vehicle Parks-Residents Rights

All tenancies in any mobilehome or permanent recreational vehicle park (as defined in Title 28) within the City of Santa Barbara existing on the effective date of the ordinance adopting this Section or created thereafter shall be protected by the provisions of Chapter 2.5 (Sections 798 through 799.6) of the California Civil Code regardless of whether said park is registered with the State of California as a "mobilehome park" or a "recreational vehicle park." (Ord. 4269, 1984.)

Chapter 26.08

MOBILEHOME AND RECREATIONAL VEHICLE PARK LEASE REGULATION

Sections:

26.08.010 Short Title.
26.08.020 Findings and Purpose.
26.08.030 Definitions.
26.08.035 Exemptions.
26.08.050 Lease Negotiation; Arbitration.
26.08.060 Rent Increase upon Transfer of ownership.
26.08.070 Notices by Park Owner.
26.08.080 Enforcement

26.08.010 Short Title.

Chapter 26.08 of Title 26 of the Santa Barbara Municipal Code may be cited as the "Mobilehome and Recreational Vehicle Park Lease Ordinance of the City of Santa Barbara." (Ord. 4285, 1984.)

26.08.020 Findings and Purpose.

A. The City Council finds and determines that there is a critical shortage of low and moderate income housing within the City and on the south coast of Santa Barbara County.

B. The City Council further finds and determines that mobilehome parks and recreational vehicle parks (also known as trailer parks) are a significant part of the remaining supply of low and moderate income housing in the City, and are frequently occupied by residents on a permanent basis. Many of the residents of these facilities are senior citizens on fixed incomes or other persons with limited economic means.

C. The City Council further finds and determines that rent increases in mobilehome and recreational vehicle parks represent a significant threat to the continued ability of park residents to afford to maintain residency in such parks. The economic impact of unaffordable rent increases on park residents is much more severe than rent increases on other tenants inasmuch as many park residents own their mobilehomes, recreational vehicles or trailers and, if forced to move because of rent increases, must bear the additional and substantial burden of paying to move those vehicles or mobilehomes to another site. There are very few places on the south coast of Santa Barbara County to which such mobilehomes or vehicles can be moved.

D. The purpose of this ordinance is therefore to regulate the rent charged for mobilehome and recreational vehicle spaces used on a permanent basis to prevent severe and inordinate rent increases, to protect certain persons of limited economic means from the disruption and expense of relocation and to provide increased certainty to park residents of their ability to maintain their current status while at the same time providing park owners with a fair return on their investment and the continuing ability to maintain their parks. (Ord. 4285, 1984.)

26.08.030 Definitions.

The following words and phrases shall have the meaning indicated, unless the context or usage clearly requires a different meaning.

A. CAPITAL IMPROVEMENT. Any addition or betterment made to a mobilehome or recreational vehicle park which consists of more than a mere repair or replacement of an existing facility or improvement and which has a useful life of five or more years.

B. CONSUMER PRICE INDEX. The Urban Wage Earners and Clerical Workers Index, Los Angeles-Long Beach-Anaheim average, all items, as published by the United States Bureau of Labor Statistics, or such other index as may be approved by resolution of the City Council.

C. DEPARTMENT. The Community Development Department of the City of Santa Barbara.

D. MOBILEHOME. As defined in Section 28.04.415 of this Code.

E. MOBILEHOME PARK. As defined in Section 28.04.415.1 of this Code.

F. MOBILEHOME PARK SPACE. As defined in Section 28.04.415.2 of this Code.

G. MOBILEHOME RESIDENT. A person who rents a space in a mobilehome park.

H. PARK OWNER. The owner or operator of a mobilehome or recreational vehicle park or an agent or representative authorized to act on said owner's or operator's behalf in connection with the maintenance or operation of the park.

I. RECREATIONAL VEHICLE. As defined in Section 28.04.468 of this Code.

J. RECREATIONAL VEHICLE PARK. As defined in Section 28.04.468.1 of this Code.

K. RECREATIONAL VEHICLE PARK SPACE. As defined in Section 28.04.468.4 of this Code.

L. RECREATIONAL VEHICLE RESIDENT. A person who rents a space in a recreational vehicle park.

M. REHABILITATION WORK. Any renovation or repair work completed on or in a mobilehome or recreational vehicle park which was performed in order to comply with an order of a public agency, or to repair damage resulting from fire, earthquake, or other causalty.

N. RENT. The consideration, including any bonus, benefits or gratuity, demanded or received by a park owner for or in connection with the use or occupancy of a space, including but not limited to monies demanded or paid for the following: meals where required by the park owner as a condition of the tenancy, parking, furnishings, other housing services of any kind, subletting, or security deposits. (Housing services are defined as those services connected with the use or occupancy of a space including, but not limited to, utilities (light, heat, water and telephone), utility connections, ordinary repairs or replacement and maintenance, including painting. This term shall also include the provision of laundry facilities and privileges, common recreational facilities, janitor service, resident manager, refuse removal, storage facilities and any other benefits, privileges or facilities.)

O. RESIDENT. A mobilehome resident and a recreational vehicle resident.

P. SPACE. A mobilehome park space and recreational vehicle park space.

Q. TENANCY. The right of a resident to use or occupy a space. (Ord. 4285, 1984.)

26.08.035 Exemptions.

This Chapter shall apply as of its effective date to all tenancies in mobilehome and recreational vehicle parks located in the City of Santa Barbara, except:

A. Tenancies used primarily for commercial purposes.

B. Tenancies in parks of four spaces or fewer, where one space is occupied by the park owner.

C. Tenancies in parks placed in operation after the effective date of this ordinance; provided, however, that such exemption shall continue in effect for only four (4) years after such creation.

D. Tenancies in spaces which a government agency owns, manages or operates.

E. Tenancies which both the park owner and the resident do not expect to exceed thirty (30) days. (Ord. 4285, 1984.)

26.08.040 Lease Provisions.

A lease shall include, at a minimum, the following provisions:

A. TERM; TERMINATION. No term shall be specified. The lease may be terminated only for one of the following reasons:

1. Failure of the resident to comply with a local ordinance or state law or regulation relating to mobilehomes or recreational vehicles within a reasonable time after the resident received a notice of noncompliance from the appropriate governmental agency.

2. Conduct by the resident, upon the park premises, which constitutes a substantial annoyance to other residents.

3. Failure of the resident to comply with a lease provision or reasonable rule or regulation of the park. No act or omission of the resident shall constitute such a failure to comply unless and until the park owner has given the resident written notice of the alleged violation and the resident has failed to adhere to the lease provision or rule or regulation within seven (7) days.

4. Nonpayment of rent, utility charges, or reasonable incidental service charges.

5. Condemnation of the park.

6. Change of use of the park, provided that the provisions of subsection f of Section 798.56 of the California Civil Code and any applicable local ordinances are followed.

7. Cessation of occupancy by the tenant with (i) sixty (60) days prior notice to the park owner, or (ii) waiver of such notice by the park owner.

B. NOTICE. Notice of termination must be given in writing in the manner prescribed by Section 1162 of the Code of Civil Procedure at lease (60) days prior to the termination date of the tenancy. Said notice shall state the date the lease terminates, the reason for the termination or refusal to renew, and the specific facts upon which the park owner is relying.

C. RENT INCREASES. A provision placing the following restrictions on a park owner's ability to increase the rent most recently and lawfully charged:

1. Rent for a space shall not be increased more frequently than once per year and all increases within any particular park shall occur at the same time each year.

2. Except as provided in Paragraph 3 of this Subsection C, a rent increase may not exceed the greater of (i) three-quarters of the percentage increase in the Consumers Price Index since the date of the last rent increase, or (ii) three (3) percent times the number of complete months since the date of the last rent increase divided by twelve.

3. A rent increase in excess of that allowed under Paragraph 2 of this Subsection C shall be allowed only to the extent it is approved by (i) the resident or (ii) an arbitrator acting pursuant to the provisions of Subsection D of this Section.

D. ARBITRATION. A provision establishing an arbitration mechanism for resolving disputes over (i) rent increase under Paragraph 3 of Subsection C of this Section, and (ii) any other issues which the parties agree to subject to arbitration. At a minimum, this provision shall specify as follows:

1. An impartial arbitrator shall be authorized to make final and binding decisions on disputed matters.

2. Arbitration shall be as expeditious as feasible and, whenever possible, should not exceed sixty (60) days from the date the arbitrator is selected to the date of the arbitrator's decision.

3. In the case of rent increase disputes:

a. The Department shall select a qualified arbitrator and shall prepare a contract to be executed by the arbitrator and park owner; and

b. The costs of the arbitrator shall be (i) paid by the park owner, and (ii) considered a reasonable operating expense within the meaning of clause (9) of Subparagraph d of this Paragraph 3 if the arbitrator approves the requested increase or any portion thereof; and

c. The arbitrator shall be authorized to examine all financial data relating to the park which is relevant to the dispute, and receive testimony (oral and written) from any affected resident of the park, the park owner or their representatives at a meeting open to all park residents affected by the proposed increase; and

d. The arbitrator shall approve such rent increase, if any at all, as is determined to be fair, just and reasonable within five days of the close of the arbitration hearing. The arbitrator's decision shall be mailed by the Department to the park owner and the affected residents or their designated representatives. In reaching that determination, the arbitrator shall consider the following factors, in addition to any other factors he or she considers relevant:

(1) Changes in the Consumer Price Index.

(2) The Voluntary Pay and Price Standards promulgated by the President of the United States or any other lawfully established state or federal government wage and price guidelines.

(3) The rent lawfully charged for comparable spaces in the County of Santa Barbara.

(4) The length of time since the last rent increase for the space or spaces specified in the rent increase proposal and the length of time necessary to receive consideration by the arbitrator.

(5) Any proposed capital improvements or rehabilitation work related to the space or spaces specified in the rent increase application, and the cost thereof, including such items as materials, labor, construction interest, permit fees and other items as the arbitrator deems appropriate.

(6) Changes in property taxes or other taxes related to the subject park.

(7) Changes in the rent paid by the park owner for the lease of the land on which the subject park is located.

(8) Changes in the utility charges for the subject park paid by the park owner and the extent, if any, of reimbursement from the residents.

(9) Changes in reasonable operating and maintenance expenses, including interest and other expenses relating to the acquisition of the land and improvements of the park.

(10) The need for repairs caused by circumstances other than ordinary wear and tear.

(11) A change in the amount and quality of services provided by the park owner to the affected residents.

e. The arbitrator shall not consider changes in operating or other expenses caused by the park owner's refinancing of the park occurring after the date of adoption of this ordinance, except where the refinancing is both reasonable and necessary to make capital improvements to the park or is the result of prior financial commitments specific to the park becoming due.

f. The arbitrator may provide that an increase in rent or a portion of an increase in rent granted by the arbitrator be limited to the length of time necessary to allow the park owner to reasonably amortize the cost of a capital improvement, including interest and a reasonable profit.

E. NO ASSIGNMENT. A provision stating that the lease is not assignable to a successor of the tenant in the absence of mutual consent of the parties. (Ord. 4285, 1984.)

26.08.050 Lease Negotiation; Arbitration.

A. MANDATORY PROVISIONS. The park owner shall offer each resident a lease which contains each of the provisions specified in Section 26.08.040, except to the extent that the parties have voluntarily agreed to modify or waive any such provision. The parties shall bargain in good faith to reach agreement on the language used to express the mandatory provisions, and shall submit any dispute which remains after such bargaining to arbitration as set forth in Paragraph C. These provisions shall be indentified in the lease as "mandatory provisions."

B. OPTIONAL PROVISIONS. The lease may contain any additional provisions to which the parties agree. Either party may propose inclusion of optional provisions. The parties shall bargain in good faith with respect to the inclusion of any such optional provisions and shall submit any dispute which remains after such bargaining to arbitration as set forth in Paragraph C. The arbitrator may impose on the parties any optional provisions which the arbitrator finds will render the lease reasonable, equitable and consistent with other leases commonly used in similar facilities. These provisions shall be identified in the lease as "optional provisions."

C. ARBITRATION. Any disputes arising between a park owner and resident under this Section shall be deemed submitted to arbitration upon the expiration of sixty (60) days after commencement of negotiations. Either party may request arbitration. The arbitrator shall be selected as set forth in Section 26.08.040,D. The costs of the arbitrator shall be paid by the park owner. One half of such costs shall be considered a reasonable operating expense under clause (9) of subparagraph d of Paragraph 3 of subsection D of Section 26.08.040. The arbitrator shall render a decision within thirty (30) days, and the decision shall be final and binding upon the parties. (Ord. 4285, 1984.)

26.08.060 Rent Increase Upon Transfer of Ownership.

If a space is voluntarily vacated by all the existing tenants as a result of a transfer of legal ownership of the mobilehome or recreational vehicle, and it is not removed from the space, then the rent may be increased by an amount not to exceed ten percent (10%). (Ord. 4285, 1984.)

26.08.070 Notices by Park Owner.

Within thirty days of the adoption of this ordinance, and upon the renting of each park space thereafter, a park owner shall give each resident a written statement advising the resident of the existence of this ordinance. The park owner shall also maintain a current copy of the ordinance available for review at the manager's premises or other convenient location within the park. (Ord. 4285, 1984.)

26.08.080 Enforcement.

A. RENT INCREASES. A park owner may not collect rent in excess of the rent most recently and lawfully charged for a park space until (i) a lease is executed by both parties with respect to that space, or (ii) a resident fails to execute a lease in a form approved by the arbitrator within thirty (30) days of the arbitrator's decision, which failure shall constitute a waiver by the resident of his or her rights under this Chapter.

B. COURT ORDER. Either party may bring an action in the Superior Court compelling the other party or the arbitrator to comply with the terms of this Chapter. Violation of this Chapter shall not be a misdemeanor, nor punishable by the imposition of civil penalties. (Ord. 4285, 1984.)

FILED

MAR 9 1987

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Nunc pro tunc

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAMS C. HALL and JEAN G. HALL, Plaintiffs-Appellants, v. CITY OF SANTA BARBARA, Defendant-Appellee.	No. 85-5838 D.C. No. CV 84-9506 LEW AMENDED OPINION

Appeal from the United States District Court
For the Central District of California
Hon. Laughlin E. Waters, District Judge, Presiding

Argued Pasadena, California - March 5, 1986
Submitted - April 11, 1986
Filed: August 22, 1986; Amended March 9, 1987 Nunc pro tunc

Before: SNEED and KOZINSKI, Circuit Judges; and SOLOMON,*/ District Judge.

KOZINSKI, Circuit Judge.

We review the district court's dismissal of plaintiffs' lawsuit seeking compensation for an alleged taking of property resulting from the operation of Santa Barbara's mobile home rent control ordinance.

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*/ The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Facts

Williams and Jean Hall own and operate the Los Amigos Mobile Home Estates, a mobile home park within the City of Santa Barbara. They provide tenants a plot of land and access to certain amenities such as water and electricity. Tenants install mobile homes, paying rent for use of the land and facilities.

Mobile homes are mobile only in the sense that they are not permanently anchored to a foundation. However, many mobile homes have no wheels and bear no other close resemblance to a motor vehicle. Nevertheless, in California they must display motor vehicle license plates, Cal. Veh. Code § 5352 (West 1971 & Supp. 1986), and are considered personal property (exempt from real property tax). Cal. Rev. & Tax. Code § 5810 (West Supp. 1986).

While tenants are free to remove their mobile homes when they move, in practice they rarely do so. California law normally prohibits mobile park operators from forcing tenants to remove mobile homes. Cal. Civ. Code § 798.73 (West 1982 & Supp. 1986). Tenants typically sell their homes to buyers who then succeed them as tenants of the mobile home park.

In August 1984 the City of Santa Barbara enacted a rent control ordinance applicable to mobile home parks. Santa Barbara, Cal., City Council Ordinance No. 4285, ch. 26.08 (Aug. 14, 1984) (hereinafter S.B. Ord.) The ordinance requires mobile park operators to offer their tenants leases of unlimited duration. These leases must provide certain key terms: They must be terminable by

the tenants at will,[1/] but by the mobile home operator only for cause, narrowly defined by the ordinance;[2/] rent increases are strictly limited;[3/] and disputes about rent or lease terms are made subject to binding arbitration. S.B. Ord. § 26.08.040.

The Halls brought this action under 42 U.S.C. § 1983,[4/] claiming that the ordinance effected a taking of their property and that such taking was neither for a public purpose nor justly compensated. Plaintiffs' claim was a novel one: they argued that by giving tenants the right to a perpetual lease at a below-market rental rate, the ordinance transfers to each of them a possessory interest in the land on which their mobile home is located. Ac-

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1/ While this is not explicitly stated in the ordinance, it appears implicit in the regulatory scheme and has been so treated by the parties. See S.B. Ord. § 26.080.040A. As with much else on this record, we have to surmise what remedies the ordinance may give the landlord in case of a tenant's untimely termination of the lease.

2/ A lease may be terminated only for one of the following reasons: (1) failure to comply with a local or state mobile home regulation; (2) conduct that constitutes substantial annoyance to other residents; (3) failure to comply with lease provisions or reasonable park rules; (4) non-payment of rent, utility charges or reasonable service charges; (5) condemnation of the park; (6) change in use of the park in accordance with California Civil Code Section 798.56(f); (7) cessation of occupancy by the tenant. S.B. Ord. § 26.08.040A.

3/ A park owner may unilaterally increase the rent once a year by three percent or by three-quarters of the increase in the Consumer Price Index, whichever is greater. S.B. Ord. § 26.080.040C. If the owner seeks a larger increase, he must submit his request to arbitration. Id. § 26.080.040C, D. In addition, whenever the space becomes vacant, the landlord may raise the rent by up to 10%. In addition, whenever the space becomes vacant, the landlord may raise the rent by up to 10%.

4/ The City of Santa Barbara is a "person" amenable to suit under 42 U.S.C. § 1983. Owen v. City of Independence, 445 U.S. 622, 638 (1980).

cording to the Halls, this interest has a market value and a market: the market for mobile homes located in mobile home parks. According to the Halls, the price of mobile homes in their park shot up dramatically after enactment of the ordinance, with many selling far above their blue book value.[5/] They claim that the substantial premium paid for mobile homes in parks subject to the Santa Barbara Ordinance reflects the transfer of a valuable property right to occupy mobile home parks at below-market rates.

The City of Santa Barbara filed a motion to dismiss and the Halls filed an opposition.[6/] At a hearing held on April 15, 1985, the district court granted the motion.[7/] The Halls appealed.

5/ The blue book is the Kelley Blue Book for Manufactured Housing (Mobile Homes), published by the Kelley Blue Book Company of Costa Mesa, California. Like the similar blue book for automobiles, it is the standard reference for prices of mobile homes.

6/ Although the Halls' complaint was somewhat elliptical, the opposition to the motion to dismiss fairly advised defendant and the district court as to the nature of plaintiffs' claim. Under such circumstances, leave to amend the complaint, rather than dismissal, is the appropriate course of action. See Forman v. Davis, 371 U.S. 178, 182 (1962); Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975). We believe the district court abused its discretion by dismissing rather than giving plaintiffs an opportunity to amend the complaint.

7/ Because the district court did not prepare a written opinion, we would have found it useful to review a transcript of the hearing on the motion to dismiss, and particularly the district judge's bench ruling. Unfortunately, neither party made a transcript available.

Discussion[8/]

It is axiomatic that "[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." 5 C. Wright & A. Miller, Federal Practice & Procedure, Civil § 1357, at 598 (1969).[9/] This admonition is perhaps nowhere so apt as in cases involving claims of inverse condemnation where the Supreme Court itself has admitted its inability "to develop any 'set formula'" for determining when compensation should be paid, Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978), resorting instead to "essentially ad hoc, factual inquiries" to resolve this difficult question. MacDonald, Sommer & Frates v. Yolo County, 54 U.S.L.W. 4782, 4784 (U.S. June 24, 1986); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). While dismissal of a complaint for inverse condemnation is not always inappropriate, such a dismissal must be reviewed with particular skepticism to assure that plaintiffs are not denied a full and fair opportunity to present their claims. See Whitney Benefits, Inc. v. United States, 752 F.2d 1554, 1558-60 (Fed. Cir.

8/ A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is a ruling on a question of law and as such is reviewable de novo. Guillory v. County of Orange, 731 F.2d 1379, 1381 (9th Cir. 1984).

9/ "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. Sanders v. Kennedy, No. 84-6370, slip op. at 6 (9th Cir. July 14, 1986); North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 580 (9th Cir. 1983).

1985); Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 887 (Fed. Cir. 1983).

In adjudicating a claim such as that presented by the Halls the court must resolve three questions: (1) Did the governmental action amount to a taking of property? See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1000 (1984). (2) Did it advance a legitimate governmental interest? See, e.g., Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). (3) Was there just compensation? See, e.g., Kaiser Aetna, 444 U.S. at 179-80. If the first question is answered in the affirmative and either of the remaining two in the negative, plaintiffs prevail; otherwise they lose. In determining whether plaintiffs' case was properly dismissed, we examine each of these issues in turn, assuming, of course, that plaintiffs' allegations are all true.

1. Was There a Taking of Property?

Supreme Court cases addressing this question can be divided into two lines of authority:[10/] the so-called regulatory taking

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10/ The Court noted the existence of these two lines of authority in Loretto v. Teleprompter Manhattan CATV Corp.:

> Since these early cases, this Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation.

458 U.S. 419, 428 (1982).

cases[11/] and the physical occupation cases.[12/] Regulatory taking cases are those where the value or usefulness of private property is diminished by regulatory action not involving a physical occupation of the property. A typical case of this sort is Penn Central Transportation Co. v. New York City, 430 U.S. 104 (1978), where New York City prohibited Penn Central from building a 55-story office tower over its Grand Central Terminal. Despite the drastic diminution in the value and usefulness of Penn Central's property, the Court held that the city's action did not amount to a taking.

Physical occupation cases are those where the government physically intrudes upon private property either directly or by authorizing others to do so. A typical case is Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), where New York City authorized Teleprompter to string 36 feet of one-half inch coaxial cable and place two switchboxes, all amounting to about one and one half cubic feet, on a private building. Despite the

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11/ E.g., United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455 (1985); Williamson County Regional Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

12/ E.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164 (1979); United States v. Causby, 328 U.S. 256 (1946); Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

minimal burden placed on the property owner, the Court in Loretto held that a taking had occurred.

As Penn Central and Loretto demonstrate, the Court reaches dramatically different results depending on whether it concludes that a particular governmental action amounts to a physical occupation of property or merely a regulation. See R. Epstein, Takings 49-50, 94 (1985) (hereinafter Epstein).[13/] As the Court explained in Loretto, the distinction lies in the fact that "a physical invasion [of property] is a government intrusion of an unusually serious character" for purposes of the taking clause. 458 U.S. at 433 (footnote omitted). Indeed, "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine," id. at 432 (footnote omitted), and "without regard to the public interests that it may serve." Id. at 426. Elsewhere the Court noted that "when the 'character of the governmental action,' Penn Central, 438 U.S., at 124, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Loretto, 458 U.S. at 434-35. See also Kaiser Aetna, 444 U.S. at 179-80 ("the 'right to exclude,' so universally held to be a fundamental element of the

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13/ Commentators have criticized this physical invasion/regulation distinction. See Epstein at 49-50; Blume & Rubinfeld, Compensation for Takings: An Economic Analysis, 70 Cal. L. Rev. 569, 574-75 (1984). Nevertheless, we are bound to respect the distinction as drawn by the Supreme Court.

property right, falls within this category of interests that the Government cannot take without compensation").

When viewed in the light most favorable to the Halls, the allegations of the complaint seem to present a claim for taking by physical occupation, as in Loretto, Kaiser-Aetna and their precursors. Reduced to its essentials, appellants' claim is that the Santa Barbara ordinance has transferred a possessory interest in their land to each of their 71 tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value. If proven, appellants' claims would amount to the type of interference with the property owner's rights the Court described so eloquently in Loretto. See Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983) (Rehnquist, J., dissenting from dismissal for want of substantial federal question).[14/]

The right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause.[15/] See United

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14/ As appellee points out, Justice Rehnquist's lone dissent in Fresh Pond suggests that the other Justices did not share his ultimate conclusion that the rent control scheme there constituted a taking. However, as discussed below, see pp. 14-18 infra, Fresh Pond is distinguishable from this case in material ways that we presume were the basis for the majority's decision. We do not interpret the Fresh Pond dismissal as repudiating everything said by Justice Rehnquist in his dissent.

15/ Professor Michelman notes as follows in his seminal article on this subject:

> [t]he one incontestable case for compensation (short of formal expropriation) seems to occur

(footnote continues)

States v. General Motors Corp., 323 U.S. 373, 378 (1945). Moreover, certain features of the Santa Barbara ordinance, and the way it is alleged to operate, make it peculiarly susceptible to the claim presented by the Halls. Thus, the ordinance directs the landlord to give tenants a lease, a recognized estate in land, lasting indefinitely.[16/] Moreover, the landlord's residual rights in the property are largely at the mercy of his tenants; he loses practically all right to decide who occupies the property, and on what terms. If a tenant moves, the tenant alone decides who will be his successor by selecting the buyer for his rental unit; the landlord has no meaningful say as to who will live on the property, now or in the future.

Moreover, because of the way the ordinance is alleged to operate, the tenant is able to derive an economic benefit from the statutory leasehold by capturing a rent control premium when he

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(footnote continued)
when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership.

Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1184 (1967), quoted with approval in Loretto, 458 U.S. at 427 n.5.

16/ S.B. Ord. § 26.080.050A. We find entirely unpersuasive the city's argument that the ordinance does not give tenants any rights in the landlord's property because the parties are free to change the terms of the lease by mutual consent. That tenants may waive the rights provided for them by the ordinance does not render those rights any less real or valuable. Presumably tenants forego a statutory lease only if the landlord offers them something better. A right is no less a right because it can be traded for something else. Indeed, the contrary is true.

sells his mobile home. In effect, the tenant is given an economic interest in the land that he can use, sell or give away at his pleasure; this interest (or its monetary equivalent) is the tenant's to keep or use, whether or not he continues to be a tenant. If the Halls' allegations are proven true, it would be difficult to say that the ordinance does not transfer an interest in their land to others. See also pp. 15-17 infra.

Loretto's explanation as to why a physical invasion of property is such a serious interference with the property owner's rights strongly supports the Halls' claim that they suffered a taking:

> Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." United States v. General Motors Corp., 323 U.S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys each of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. See Kaiser Aetna, 444 U.S., at 179-180; see also Restatement of Property § 7 (1936). Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, see Andrus v. Allard, [444 U.S.,] at 66, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied

> space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Loretto, 458 U.S. at 435-36 (emphasis original; footnote omitted).

Appellee's arguments supporting the district court's dismissal are not persuasive. Thus, it does not matter that the tenants' right to occupy space in the Los Amigos Home Estates is not truly perpetual because the ordinance might someday be repealed. A governmental taking can always be undone if the government so chooses. That has never defeated a taking claim. See, e.g., cases cited nn. 11 & 12 supra. See also San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 656-57 (1981) (Brennan, J., dissenting).[17/] Nor does the fact that tenants may be removed for

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17/ Two commentators have addressed a closely related problem in the following terms:

> The Supreme Court . . . holds that it is the rights of the property owner, not the rights of the property, that have significance.
>
> To account for those rights, one must abandon abstract calculations which obfuscate the problem by attempting to relate use prohibitions for periods of years to the perpetual life of the realty. Instead, one must examine the hardship placed on individuals by such actions. Sometimes delay in ability to use property leads to foreclosure. Sometimes the owner dies. Given the reality of inflation, the cost of developing the property may increase. Real estate taxes continue to be demanded, often by the entity which is preventing the property from being used.

(footnote continues)

cause, see p.3 & n.2 supra, defeat the Halls' claim. The ability to remove tenants for cause may lessen somewhat the economic impact of the Santa Barbara ordinance; it does not change the fact that tenants are given an indefeasible right to possession so long as they pay the controlled rent and behave themselves.

Nor does it matter that the physical occupation here is by tenants and not by the City of Santa Barbara itself. The Court addressed this point in Loretto, holding that "[a] permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." 458 U.S. at 433 n.9; see Epstein at 187. Also put to rest by Loretto is the notion that the physical occupation is not permanent where the landlord could evict the tenants by going out of business.[18/] The Court gave short shrift to this argu-

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(footnote continued)
Berger & Kanner, Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property, 19 Loyola L.A. L. Rev. 685, 744-45 (1986) (emphasis original; footnotes citing examples omitted).

18/ In any case, we note some skepticism as to whether this is an option realistically available to the Halls. State and local laws seem to pose considerable obstacles to going out of the mobile park business. State law allows the mobile park owner to evict tenants in order to put the park to a different use only upon giving six months' notice; such notice may only be given after all necessary local permits have been obtained. Cal. Civil Code § 798.56(f). Santa Barbara in turn requires that a mobile home park owner obtain a permit to convert a park to another use. Santa Barbara, Cal., Municipal Code ch. 28.78.010 (1984). An applicant for such a permit must file a plan outlining the use to which the property is to be put, describing the impact of the removal on displaced residents, and disclosing the relocation assistance to be provided. Id. ch. 28.78.040. Any such plan must be approved by the city's Community Development Department. Id. ch. 28.78.050.

ment, noting that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." Loretto, 458 U.S. at 439 n.17.

The city's argument that appellants are adequately compensated by the rents they receive is irrelevant to the determination of whether a taking has occurred. See Troy Ltd. v. Renna, 727 F.2d 287, 300 (3d Cir. 1984). Whether compensation is adequate is an inquiry separate from whether there has been a taking. In Loretto, for example, state law provided for compensation. The Court nevertheless determined that there was a taking through physical occupation. It left it to the state courts to determine whether the compensation provided was adequate. 458 U.S. at 441. We address this question below. See pp. 21-22 infra.

Finally, the city cites various cases,[19/] some of them decided since Loretto,[20/] where rent control statutes or ordinances have been upheld. Essentially, the city suggests that, whatever the applicability of taking law to other governmental actions, rent control is conclusively constitutional. We cannot agree. In

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19/ See, e.g., Block v. Hirsh, 256 U.S. 135 (1921) (upholding District of Columbia rent control ordinance as a temporary measure); Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948) (upholding rent limits on certain accommodations in "defense-rental areas" as a valid exercise of the war power).

20/ See, e.g., Fisher v. City of Berkeley, 105 S. Ct. 2653 (1985) (dismissing appeal of ruling that rent control statute need not provide landlord a reasonable return on his investment); Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983) (dismissing appeal of ruling upholding rent control statute limiting right to remove a tenant for personal use of rental unit); Troy Ltd. v. Renna, 727 F.2d 287 (3d Cir. 1984) (upholding New Jersey law prohibiting eviction of certain older tenants from apartments converted to condominiums).

light of the Supreme Court's own unwillingness to provide any hard and fast rules in this sensitive area, we cannot indulge the notion that a city may eviscerate a property owner's rights and shield its action from constitutional scrutiny by calling it rent control.[21/]

We have examined the cases cited by the city and find them distinguishable in a way we think the Supreme Court would find material. In none of the cited cases has the landlord claimed that the tenant's right to possess the property at reduced rental rates was transferable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others.

This is not a minor difference; it is crucial. The fact that the tenant can sell his interest to third parties drastically affects the economic realities of the landlord/tenant relationship. The typical rent control statute modifies the landlord/tenant relationship somewhat to protect tenants from perceived evils of the

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21/ Troy Ltd. v. Renna, 727 F.2d 287 (3d Cir. 1984), does contain language suggesting that a rent control ordinance can never constitute a taking because occupancy of the property by tenants is a private rather than a public use for purposes of the taking clause. Id. at 301-03. This attempt to distinguish Loretto was effectively overruled by Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), which squarely held that transferring property "in the first instance to private beneficiaries does not condemn that taking as having only a private purpose." 467 U.S. at 243-44.

In any case, Troy must be read in light of its facts, which are materially distinguishable from ours. See, e.g., n.22 infra. Despite the broad language used in the opinion, we doubt that the Troy court would conclude that government may take private property from one person and give it to another without implicating the taking clause.

free-enterprise system. But see n.26 infra. By contrast, the Santa Barbara Ordinance, as it is alleged to operate, changes the fundamental relationship between the parties, giving landlord and tenant complementary estates in the same land. On the one hand, the landlord loses forever a fundamental aspect of fee simple ownership: the right to control who will occupy his property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him when he leaves the property, or even the City of Santa Barbara.

That tenants normally cannot sell their rights in rent controlled property provides important safeguards for landlords. Tenants, like the rest of us, are not immortal; nor are they immune to the normal familial and economic pressures that occasion vacancies even in rent controlled housing.[22/] If they are denied the right to cash out, tenants can enjoy the benefits of rent control only so long as they remain tenants, not beyond. When the premises become vacant, the landlord is able to reassert a measure of control over the property. He may chose to occupy it himself; or to allow a friend or relative to stay there; or to keep it vacant; or make improvements in the hope of raising the rent to the extent allowed by law; or to rent it to a new tenant, presum-

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22/ This was a key point supporting the court's conclusion that no taking had occurred in Troy, a case on which the city relies heavily. Troy noted that "[m]ost tenants with a protected status will be 70 years of age (or, if surviving spouses, 58 years of age) before the Tenancy Act comes into play. It is fanciful to imagine that these tenants will occupy their units 'permanently.' Moreover, the tenancies may terminate by virtue of changing income levels or principal residences, and tenants may be evicted on any of thirteen grounds." 727 F.2d at 301.

ably making the selection on the basis of factors that will maximize his total return from the property.[23/] Between tenants, the landlord can thus assert important prerogatives as property owner and make significant decisions as to the property's use. The tenant, for his part, must make difficult choices: if he wants the benefits of the rent control ordinance, he must stay put. If he wants to leave, he must give up a good thing.[24/]

23/ Even if the property owner may not increase his monetary income by raising the rent, his choice of tenants may increase his economic return in some other fashion. Thus, he may choose tenants with smaller families over those with larger ones, on the theory that fewer people place less of a strain on the mobile park's resources. For similar reasons, he may prefer families without pets and those where the breadwinner travels a lot. On the theory that frequent vacancies increase his control over the property, or allows for faster rent increases (see S.B. Ord. § 26.080.060), he may well prefer older tenants to younger ones.

In addition to selecting on the basis of factors that enhance his economic return, the landlord may also select on the basis of noneconomic factors that nevertheless increase the total benefit he derives from the property. See A. Alchian & W. Allen, University Economics 146 (3d ed. 1972) (hereinafter Alchian & Allen). Thus, landlords may select attractive pleasant applicants over slovenly belligerent ones, and nonsmoking teetotalers over smokers who drink.

The landlord's ability to exercise these choices with respect to the property is an important attribute of ownership and allows him to retrieve, in some measure, the monetary loss he suffers as a result of rent control. To the extent these choices are narrowed or eliminated altogether, the burden on the landlord is increased and his essential attributes of ownership are eroded until they become illusory.

24/ The inability of tenants to transfer rights in rent controlled property no doubt creates market inefficiencies. See Alchian & Allen at 154; P. Samuelson & W. Nordhaus, Economics 393-94 (12th ed. 1985); Muth, Redistribution of Income Through Regulation in Housing, 32 Emory L.J. 691, 694-95 (1983). However, "[n]othing in economic analysis warrants a judgment about which allocative procedures are good or bad. That judgment must be based on criteria derived from other sources." Alchian & Allen (footnote continues)

In short, under a rent control scheme where the tenant is not allowed to monetize his rights, benefits and burdens are shifted somewhat between landlord and tenant, but neither gets the full bundle of sticks. By contrast, as the Santa Barbara ordinance is alleged to operate, landlords are left with the right to collect reduced rents while tenants have practically all other rights in the property they occupy. As we read the Supreme Court's pronouncements, this oversteps the boundaries of mere regulation and shades into permanent occupation of the property for which compensation is due.

(2) Did the Ordinance Substantially Advance a Legitimate State Interest?

We first note a potentially significant difference in the standard by which governmental action must be adjudged depending on whether it is a deliberate exercise of the eminent domain power or regulatory action that results in an incidental taking. In Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), the Court explored the meaning of the "public use" requirement in the fifth amendment's eminent domain clause. The Court held that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." 467 U.S. at 240. The Court also held that it would not "substitute its judgment for a legislature's

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(footnote continued)
at 154. Here, the very fact of the inefficiency--that the tenant is not given too great a stake in the property--saves most rent control schemes from potential unconstitutionality. After all, efficiency would be maximized by giving the tenant a fee simple interest in the property.

judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" 467 U.S. at 241 (quoting United States v. Gettysburg Electric R.R., 160 U.S. 668, 680 (1896)).

The Court in Midkiff did not address the somewhat different articulation of the standard applicable in cases where there was no deliberate exercise of the eminent domain power. For example, it did not mention Agins v. City of Tiburon, 447 U.S. 255 (1980), where it had noted that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . ." Id. at 260 (citing Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)); see also United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455, 459 (1985) (citing Agins); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981) (same). The Midkiff Court left open the possibility that less deference would be afforded where government does not intend to effect a taking than where it does. See Midkiff, 467 U.S. at 241 (distinguishing Missouri Pacific R.R. v. Nebraska, 164 U.S. 403, 416 (1896), on the ground that "the 'order in question was not, and was not claimed to be [emphasis original], . . . a taking of private property for a public use under the right of eminent domain'").[25/]

25/ It makes considerable sense to give greater deference to the legislature where it deliberately resorts to its eminent domain power than where it may have stumbled into exercising it through actions that incidentally result in a taking. In the former case, the court is validating the will of the legislature; in the latter, it may be thwarting the legislative will by ordering com-
(footnote continues)

Even under the deferential Midkiff standard, public use is not established as a matter of law whenever the legislature acts. While the scope of judicial scrutiny is narrow, "[t]here is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power." Midkiff, 467 U.S. at 240. The test appears to be whether the legislature chose an objective that is within its authority under the police power, and whether it "rationally could have believed that the [Act] would promote its objective." 467 U.S. at 242 (emphasis original) (quoting Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 671-72 (1981)). The test in inverse condemnation cases may well be more stringent.

Here, the Santa Barbara City Council enacted the ordinance to alleviate what it perceived as "a critical shortage of low and moderate income housing." S.B. Ord. § 26.08.020A. If appellants' allegations are substantiated, there would be significant doubt whether these purposes are achieved, or could rationally be thought achievable, by means of the ordinance.

If appellants are able to prove their allegations, it would seem that the Santa Barbara ordinance will do little more than give a windfall to current mobile park tenants at the expense of current mobile park owners. If, as appellants allege, the ordi-

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(footnote continued)
pensation where the legislature had no intention of engaging in a compensable transaction.

nance has resulted in a substantial increase in the market price of mobile homes subject to the ordinance, this may well hinder rather than assist lower-income families seeking access to rental units in mobile park homes. We express no view on this score; we merely hold that the issue must be considered and addressed by the district court on the basis of a complete record.[26/]

(3) Was Adequate Compensation Paid?

The adequacy of compensation, if any, paid to appellants is yet another inquiry fraught with factual uncertainty. The city would short-circuit this process by arguing that appellants are adequately compensated because they are entitled to rent that assures them a fair return on their investment. That, however, is not the test in cases involving a claim of taking by physical invasion, as opposed to mere regulation. For example, Mrs. Loret-

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26/ We also note what appears to be a growing consensus that "rent control causes a reduction in the quality of the existing rental housing stock and discourages investment in new rental property," actually exacerbating the problems it is intended to ameliorate. The Report of the President's Commission on Housing 91 (1982). See, e.g., P. Samuelson & W. Nordhaus, Economics 393-94 (12th ed. 1985); W. Baumol & A. Blinder, Economics: Principles and Policy 62-64 (3d ed. 1985); Muth, supra note 24, at 693-98; cf. Frey, Pommerehne, Schneider & Gilbert, Consensus and Dissension Among Economists: An Empirical Inquiry, 74 Amer. Econ. Rev. 986, 988, 991 (1984) (fewer than 2 percent of United States economists surveyed at random generally disagreed with the proposition that "[a] ceiling on rents reduces the quantity and quality of housing available"); see also Rent Control's Big Dilemma, San Francisco Chron., Feb. 28, 1986, at 76, col. 1. The rationality of rent control vel non may have to be reassessed in light of this growing body of thought on the subject. Cf. Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 54 U.S.L.W. 4319, 4323 (U.S. March 26, 1986)(reexamining inference to be drawn in predatory pricing cases in light of recent law and economics commentary on the subject).

to's claim was not defeated because she continued to collect rents on the apartment building upon which the cable was strung. See Loretto, 458 U.S. at 442.[27/]

Here, the rental payments compensate the Halls for use of the land during the rental period, plus whatever amenities they provide tenants. However, if their claim is substantiated, the Halls are entitled to additional compensation for the taking of their property: the possessory interest in the land allegedly transferred to each of their tenants. It may well be that the rental payments (together with such increases as are permitted under the ordinance) adequately compensate the Halls for the taking of their property. However, this cannot be assumed; it must be proven.. To make this determination, the court must ascertain the value of the interest allegedly transferred to each tenant and the value of what the Halls received, if anything, in addition to normal rental payments. All these are matters that must be considered by the district court on remand.[28/]

27/ The cases appellee cites, e.g., Agins, 447 U.S. 255, and Penn Central, 438 U.S. 104, stand for the proposition that the existence of residual economic value in the property defeats a taking claim where a regulatory taking is alleged. This rationale simply does not apply to cases involving a taking by physical occupation.

28/ The city also argues that the Halls' claim is premature, citing Williamson County Regional Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108 (1985). It is not clear what the city would have the Halls do to perfect their claim. Unlike Williamson and the more recent case of MacDonald, Sommer & Frates v. Yolo County, 54 U.S.L.W. 4782 (U.S. June 25, 1986), the Halls have no further administrative recourse available; there is nothing they may do under the Santa Barbara ordinance that would exempt them from its reach or cut off the rights they claim tenants (footnote continues)

Conclusion

Because there has been no trial, we cannot and do not express any view as to whether the Santa Barbara ordinance constitutes a taking. We hold only that, on the facts alleged, it may, and that at this stage we are unable to resolve this fact-bound issue. In such circumstances, the motion to dismiss was improvidently granted and we remand the case to the district court for further proceedings consistent with this opinion.

(footnote continued)
now have in their land.

Williamson and MacDonald were regulatory taking cases, not physical invasion cases. By their nature, regulatory taking cases are not ripe for constitutional adjudication until the governmental authority has had its final say, thereby defining precisely what (if anything) was taken. As the Court said in MacDonald, "[u]ntil a property owner has 'obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property,' 'it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interest ha[ve] been destroyed.'" 54 U.S.L.W. at 4784 (quoting Williamson, 105 S. Ct. at 3118 n.11). This, of course, is the test in regulatory taking cases, not physical invasion cases.

The inapplicability of the Williamson/MacDonald line of cases underscores the difference between this case and the regulatory taking cases on which the city relies so heavily. Where there has been a physical invasion, the taking occurs at once, and nothing the city can do or say after that point will change that fact.

(3)

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No. 87-220

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CITY OF SANTA BARBARA,
Petitioner,

VS.

WILLIAMS C. HALL and JEAN G. HALL,
Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit.

AMICUS CURIAE BRIEF OF THE CITIES OF BERKELEY, CAPITOLA, CARSON, CATHEDRAL CITY, FONTANA, HAYWARD, LOS ALTOS, LOS ANGELES, MOUNTAIN VIEW, OXNARD, PALM SPRINGS, RANCHO MIRAGE, RIALTO, SAN BUENAVENTURA, SAN JOSE, SAN LUIS OBISPO, SANTA MONICA, VACAVILLE, VALLEJO, WEST HOLLYWOOD, WESTLAKE VILLAGE AND THE COUNTY OF SANTA BARBARA IN SUPPORT OF PETITION FOR CERTIORARI

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22pp

TABLE OF CONTENTS

	Page
INTEREST OF AMICI	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I.	
REVIEW IS REQUIRED TO CLARIFY THE STANDARD OF JUDICIAL REVIEW APPLICABLE TO ECONOMIC REGULATION	6
II.	
REVIEW IS REQUIRED TO CLARIFY WHEN RENT CONTROL SHOULD BE JUDGED UNDER THE RULES APPLICABLE TO REGULATORY ACTION AND WHEN IT SHOULD BE REVIEWED UNDER THE RULES APPLICABLE TO A PHYSICAL INVASION	9
III.	
REVIEW IS REQUIRED TO CLARIFY THE APPLICABILITY OF THE RIPENESS DOCTRINE TO RENT REGULATION	12
IV.	
REVIEW IS REQUIRED TO RESOLVE CONFLICTS BETWEEN THE OPINION HEREIN AND THE OPINIONS OF THIS COURT, OTHER CIRCUITS AND STATE SUPREME COURTS	14
CONCLUSION	15

TABLE OF AUTHORITIES CITED

Cases

Page

Berman v. Parker, 348 U.S. 26 (1954) 9

Birkenfeld v. City of Berkeley, 17 Cal.3d 129, 130 Cal.Rptr. 465, 550 P.2d 1001 (1976) 10, 11, 14

Block v. Hirsh, 256 U.S. 135 (1921) 4, 9, 11

Carson Mobilehome Park Owners' Assoc. v. City of Carson, 35 Cal.3d 185, 197 Cal.Rptr. 284, 672 P.2d 1297 (1983) 5, 14

Federal Communications Commission v. Florida Power Corp., 480 U.S. ____, 107 S.Ct. 1107 (1987) 5, 10, 14

Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 571 (1944) 4, 9

Federal Power Commission v. Natural Gas Pipeline Co., 531 U.S. 575 (1942) 9, 10

Fisher v. City of Berkeley, 37 Cal.3d 644, 209 Cal.Rptr. 682 (1984) 4, 5, 9, 11, 14

Fresh Pond v. Troy Ltd., 727 F.2d at 301.....10, 14

Fresh Pond Shopping Center, Inc. v. Callahan, 446 U.S. 875 (1983) 5

Grace v. Town of Brookline, 399 N.E. 2d 1038 (Mass. 1974).....5, 11, 14

Hall v. City of Santa Barbara, 813 F.2d 198 (9th Cir. 1987)..... 3, 5, 6, 7, 8, 12

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).....6, 7, 8, 9

Hutton Park Gardens v. Town Council, 68 N.J. 543, 350 A.2d 1 (1975) 5, 10, 14

Lochner v. New York, 198 U.S. 45 (1905) 6

TABLE OF AUTHORITIES CITED

CASES

	Page
Loretto v. Telecompter Manhattan CATV Corp., 458 U.S. 419 (1982)	4
MacDonald, Somer & Frates v. Yolo County, U.S. ——, 106 S.Ct. 2561 (1986)	6, 13
Nebbia v. New York, 291 U.S. 502 (1934)	4, 6
Palos Verdes Shores Mobile Estates v. City of Los Angeles, 142 Cal.App.3d 362, 190 Cal.Rptr. 866	11
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	4, 9
Ross v. City of Berkeley, 655 F.Supp. 820 (N.D. Cal. 1987)	4
Troy, Ltd. v. Renna, 727 F.2d 287 (3rd Cir. 1984)	5, 11
Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955)	4, 6, 7
Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985)	6, 13

Statutes

California Civil Code, Section 798	2, 11
Santa Barbara Ordinance, Section 26.08.040(c)(3)	12

Textbooks

Baar, Guidelines for Drafting Rent Control: Lessons of a Decade, 35 Rutg. L.R., 723, 725, n.1. (1983)	2
California Planners 1987 Book of Lists, California Office of Planning and Research	2
K. Rosen, California Housing Markets in the 1980s: Demand, Affordability and Politics, 48, 57 (1984)	2

No. 87-220

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CITY OF SANTA BARBARA,

Petitioner,

VS.

WILLIAMS C. HALL and JEAN G. HALL,

Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit.

AMICUS CURIAE BRIEF OF THE CITIES OF BERKELEY, CAPITOLA, CARSON, CATHEDRAL CITY, FONTANA, HAYWARD, LOS ALTOS, LOS ANGELES, MOUNTAIN VIEW, OXNARD, PALM SPRINGS, RANCHO MIRAGE, RIALTO, SAN BUENAVENTURA, SAN JOSE, SAN LUIS OBISPO, SANTA MONICA, VACAVILLE, VALLEJO, WEST HOLLYWOOD, WESTLAKE VILLAGE AND THE COUNTY OF SANTA BARBARA IN SUPPORT OF PETITION FOR CERTIORARI

The Cities of Berkeley, Capitola, Carson, Cathedral City, Fontana, Hayward, Los Altos, Los Angeles, Mountain View, Oxnard, Palm Springs, Rancho Mirage, Rialto, San Buenaventura, San Jose, San Luis Obispo, Santa

Monica, Vacaville, Vallejo, West Hollywood and Westlake Village and the County of Santa Barbara respectfully submit this Amicus Curiae brief pursuant to Rule 36.4 in support of the Petition for Certiorari filed by the City of Santa Barbara.

INTEREST OF AMICI

Amici are 21 California cities and one California county. They vary in size from the largest to one of the smallest cities in California. They are located throughout the State and differ widely in socioeconomic characteristics. All Amici have enacted some form of rent stabilization in response to severe shortages of rental housing.[1]

The California vacancy rate is about 2%, less than one-third the national average.[2] Thirteen local California jurisdictions have adopted controls which apply to apartment units, fifty-one regulate space rents in mobilehome parks and three regulate commercial rents.[3] California has recognized the particular vulnerability of mobilehome owners who rent space in mobilehome parks by adopting the Mobilehome Residency Law, California Civil Code Section 798, *et seq.*, which provides eviction protections and the right to sell a mobilehome in place to the tenants of each of the 380,000 mobilehome spaces in the State.

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[1]Ten to twelve percent of the nation's housing stock is subject to rent regulation. Baar, Guidelines for Drafting Rent Control: Lessons of a Decade, 35 Rutg. L. Rev., 723, 725, n.1 (1983).

[2]K. Rosen, California Housing Markets in the 1980s: Demand, Affordability and Politics, 48, 57 (1984).

[3]California Planners 1987 Book of Lists, California Office of Planning and Research.

Some of Amici have ordinances which, like the Santa Barbara ordinance herein, regulate only rental rates for spaces in mobilehome parks, while others have ordinances which regulate rental rates only in apartment units or in both mobilehome parks and apartment units. The provisions of these ordinances vary greatly, and they do not all contain a provision like that at issue in this case. However, all Amici are concerned by the serious threat to local control and economic regulation which has been created by the Ninth Circuit opinion herein (the "opinion").[4]

Although the decision focuses on the regulation of space rents in mobilehome parks, its reasoning threatens all economic regulation by indicating that the courts should sit as super-legislatures, second-guessing the social and political judgments of elected legislative bodies and by somehow transmuting mere rate regulation into a physical invasion of property and thus a compensable taking. It thus threatens the ability of local jurisdictions to enact economic regulations tailored to local circumstances as well as years of well-settled law concerning the deference which the courts should give to social and economic regulation.

Moreover, the opinion has already spawned confusion and a raft of litigation. In addition to the instances cited in Santa Barbara's Petition, cases based on the opinion have also been filed against the County of Santa Cruz and the City of Santa Monica.[5] Further, the Northern District

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[4]*Hall v. City of Santa Barbara*, 813 F.2d 198 (9th Cir. 1987), Appendix ("App.") C, D & E to the Petition herein.

[5]De Anza Properties v. County of Santa Cruz, District Court Case No. C 87-200041-SW; Hager v. City of Santa Monica, Los Angeles Superior Court Case No. WEC 103984; Treffinger v. City of Santa Monica, Los Angeles Superior Court Case No. WEC 116187.

of California has recently relied on the opinion in reviewing the City of Berkeley's Commercial Rent Control Ordinance. *Ross v. City of Berkeley,* 655 F.Supp. 820, 841 (N.D.Cal. 1987) modified in other respects, 6/11/87, No. C-85-7321. Although *Ross* relied on the opinion to indicate that the challenged provision of the Berkeley ordinance was invalid, it dismissed the case on the ground that it was not ripe. Thus, there is considerable uncertainty as to how to apply the opinion herein and how to reconcile it with the conflicting decisions of this Court, other circuits and state courts. Review and guidance by this Court is, therefore, sorely needed.

SUMMARY OF ARGUMENT

A rent stabilization ordinance is simply a species of economic regulation. Such regulations have long been judged proper so long as they have a debatable rational basis and permit those subject to regulation to earn a just and reasonable return. *Nebbia v. New York,* 291 U.S. 502 (1934); *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483 (1955); *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. 571 (1944); *Block v. Hirsh,* 256 U.S. 135 (1921); *Permian Basin Area Rate Cases,* 390 U.S. 747, 769-770 (1968); *Fisher v. City of Berkeley,* 37 Cal.3d 644, 209 Cal.Rptr. 682 (1984), portion of appeal *re* constitutionality of rent control ordinance dismissed, 471 U.S. 1124 (1985), aff'd. on other grounds, 475 U.S. 260 (1986).

The opinion ignores these precedents by concluding that Santa Barbara's regulation of rental rates and the regulation of evictions necessarily incident to such regulation constitute a physical invasion of property like that invalidated in *Loretto v. Telecompter Manhattan CATV Corp.,* 458 U.S. 419 (1982). However, that conclusion conflicts with this Court's recent rejection of a very

similar attempt to extend *Loretto* to landlord/tenant regulation in *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. ____, 107 S.Ct. 1107 (1987).

The opinion further conflicts with the decisions in *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983) (appeal dismissed), *Fisher*, and the Third Circuit decision in *Troy, Ltd. v. Renna*, 727 F.2d 287 (3rd Cir. 1984), which upheld restrictions more extensive than the eviction regulations in the Santa Barbara ordinance. It also conflicts with the California Supreme Court decision in *Carson Mobilehome Park Owners' Assoc. v. City of Carson*, 35 Cal.3d 185, 197 Cal.Rptr. 284, 672 P.2d 1297 (1983), which upheld a mobilehome park space rent regulation similar to, but more stringent than Santa Barbara's, with the New Jersey Supreme Court decision in *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 350 A.2d 1 (1975), and the Massachusetts Supreme Court decision in *Grace v. Town of Brookline*, 399 N.E.2d 1038 (Mass. 1974).

As those judges dissenting from the Ninth Circuit's denial of a rehearing en banc in this case stated:

> "This case is important. Although it is not a decision on the merits invalidating any ordinance, it is an authorization for broad, wholesale attacks upon rent control regulation. It casts a shadow upon all economic regulation. Our court must now sit idly by and watch taxpayers' money and court time being expended in litigation over the effects of this decision. I regret that we did not take this case en banc and put our circuit back in line with the Supreme Court and the rest of the country."

(Opinion, 813 F.2d at 211, App. E-6 and 7.)

Finally, the decision conflicts with the repeated and recent holdings of this Court that a taking claim is not ripe until after there has been a final decision as to how the challenged regulation affects the plaintiff. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190-192 (1985); *MacDonald, Somer & Frates v. Yolo County*, 477 U.S. ____, 106 S.Ct. 2561, 2567-2569 (1986). The plaintiffs allege that artificially low rents resulting from the Santa Barbara ordinance enable the mobilehome owners residing in their park to sell their homes at a premium. The opinion held this allegation to be crucial in distinguishing this case from the rent control regulations previously upheld by this Court, other circuits and state courts. (opinion, 813 F.2d at 205, App. C-14.) Yet had the plaintiffs sought a rent increase under the administrative procedure provided by the Santa Barbara ordinance, their rents might well be higher and the alledged premium in sales price, if any, might well disappear. Thus, it is impossible to determine just what the final impact of the Santa Barbara ordinance on plaintiffs' property will be.

ARGUMENT

I.

REVIEW IS REQUIRED TO CLARIFY THE STANDARD OF JUDICIAL REVIEW APPLICABLE TO ECONOMIC REGULATION.

Although there was a period early in this century when the courts engaged in reviewing the wisdom of socioeconomic regulation (*Lochner v. New York*, 198 U.S. 45 (1905)), that practice has been repeatedly and unequivocally rejected. *Nebbia v. New York*, 291 U.S. 502 (1934); *Williamson v. Lee Optical*; *Hawaii Housing Authority v.*

Midkiff, 467 U.S. 229 (1984). As explained by this Court in *Williamson v. Lee Optical*:

> "But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

348 U.S. at 487-488 (citations omitted).

This principle was affirmed in *Midkiff*, as follows:

> "[O]ur cases make clear that empirical debates over the wisdom of takings — no less than debates over the wisdom of other kinds of socioeconomic legislation — are not to be carried out in the federal courts."

467 U.S. at 243.

Although the opinion herein cites *Midkiff*, it appears to have followed a different rule. Thus, it first quotes *Midkiff* for the well settled rule that the public use requirement of the Fifth Amendment takings clause is "coterminous with the scope of a sovereign's police powers." (opinion, 813 F.2d at 206-207, App. C-17.) It also cites *Midkiff* for the equally well settled rule that "[t]he test appears to be whether the legislature chose an objective that is within its authority under the police power, and whether it 'rationally could have believed that the [Act] would

promote its objectives.' " (opinion, 813 F.2d at 207, App. C-18.)

However, the opinion then relies on *Midkiff* for the novel proposition that: "[L]ess deference would be afforded where government does not intend to effect a taking than where it does." (opinion, 813 F.2d at 207, App. C-17 & 18.) This suggests the anomalous result that a local government may be reviewed more strictly when it makes a good faith mistake than when it sets out to effect a taking.

The opinion further questions the wisdom of Santa Barbara's ordinance and directs the trial court to review its wisdom:

> "If appellants' allegations are substantiated, there would be significant doubt whether these purposes are achieved, or could rationally be thought achievable, by means of the ordinance.
>
> "... We express no view on this score; we merely hold that the issue must be considered and addressed by the district court on the basis of a complete record.[26]"

(Opinion, 813 F.2d at 207-208, App. C-19.)

In footnote 26, the opinion questions the wisdom of rent control, noting: "[w]hat appears to be a growing consensus that 'rent control causes a reduction in the quality of the existing rental housing stock and discourages investment in new rental property' actually exacerbating the problems it is intended to ameliorate."

While this quote states one political or socioeconomic viewpoint, it is clearly not the only valid viewpoint and the fact that rational minds may differ is not a basis for

invalidating legislation.[6] The opinion's directive to review the wisdom of ordinances nonetheless governs all the district courts in the Ninth Circuit, and may well influence other circuits, unless modified by this Court. Aside from the fact that it represents a significant departure from years of well settled law, it is impossible to know how to reconcile it with the equally binding directives in the above-cited cases.

II.

REVIEW IS REQUIRED TO CLARIFY WHEN RENT CONTROL SHOULD BE JUDGED UNDER THE RULES APPLICABLE TO REGULATORY ACTION AND WHEN IT SHOULD BE REVIEWED UNDER THE RULES APPLICABLE TO A PHYSICAL INVASION.

Rent control ordinances, like other socioeconomic regulation, have generally been reviewed under the rational basis test discussed above. *Block v. Hirsh,* 256 U.S. at 156-158; *Federal Power Commission v. Hope National Gas Co.,* 320 U.S. at 602; *Fisher v. City of Berkeley,* 37 Cal.3d at 691; *Permian Basin Area Rate Cases,* 390 U.S. at 769-770; *Federal Power Comm. v. Natural Gas Pipeline Co.,* 531

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[6]It is obvious from the above-quoted statistics and rent control cases that many legislatures and courts hold a different view. The opinion focuses on the alleged windfall to selling mobile-home owners and ignores the stated purposes of providing protection against rent gouging in a market where there is a severe shortage of spaces and the mobilehome owners who are park tenants could not find a place to move their homes to even if they could afford the significant cost of doing so. However, the existence of a windfall to private parties has never been a sufficient basis for finding a taking or invalidating public purpose. *Midkiff,* 467 U.S. at 240; *Berman v. Parker,* 348 U.S. 26, 32-34 (1954).

U.S. 575, 585-586 (1942); *Fresh Pond v. Troy Ltd,* 727 F.2d at 301-302; *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129, 165, 130 Cal.Rptr. 465, 550 P.2d 1001 (1976); *Hutton Park Gardens,* 350 A.2d at 15. Under this test a rent control ordinance must be found constitutional so long as it has a debatable rational basis and permits those regulated to earn a just and reasonable return.

There is not even an allegation by plaintiffs, nor could there be since they have never applied for a rent increase, that the Santa Barbara ordinance does not permit a just and reasonable return. Although the opinion indicates there is doubt as to the wisdom of rent control in general and of Santa Barbara's ordinance in particular, that is not a sufficient basis for invalidation under the rational basis test.

The opinion nonetheless finds a possible taking by concluding that the allegations state a claim for a physical invasion taking under *Loretto.* Yet it is clear from the face of Santa Barbara's ordinance (App. A) that it regulates the relationship between landlord and tenant only after a landlord has of his own free choice invited tenants onto his property. Nothing in the ordinance compels the property owner to rent his property. As this Court recently explained in *Florida Power Corp.,* such an invitation by the property owner precludes the application of the *Loretto* physical occupation rule:

> "Respondents contend, in essence, that it is a taking under *Loretto* for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79. But it is the invitation, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license."

Id., 458 U.S. at ____; 107 S.Ct. 1107 at 1112.

Thus, review is required to reconcile the conflict between this Court's opinion in *Florida Power Corp.* and the opinion herein. Moreover, the opinion appears to rely on a combination of the eviction restrictions in the Santa Barbara ordinance and the California Mobilhome Residency Law, California Civil Code Section 798, *et seq.*, which permits mobilehome owners to sell their mobilehomes in place in a park, subject to the park owner's reasonable approval. Yet restrictions on evictions have repeatedly been upheld (*Block v. Hirsch*, 256 U.S. at 157, *Fisher*, 37 Cal.3d at 691, *Troy, Ltd.*, 727 F.2d at 300, *Grace v. Town of Brookline*, 399 N.E.2d at 1045-46, *Birkenfeld*, 17 Cal.3d at 148) and the right to sell a mobilehome in place is no more intrusive than the restrictions upheld in *Fresh Pond* and *Troy Ltd.*

The opinion's reliance on the provisions of the California Mobilehome Residency Law further raises the question whether such state regulation can properly result in the invalidation of otherwise valid rent control, particularly where the California courts have held that this state regulation was *not* intended to preempt rent control. *Palos Verdes Shores Mobile Estates v. City of Los Angeles*, 142 Cal.App.3d 362, 373-374, 190 Cal.Rptr. 866, petition for hearing denied by Cal.Sup.Ct. (1983). The opinion also raises the question whether it is not actually the state law provision guaranteeing the right to sell a mobilehome in place rather than Santa Barbara's ordinance which creates the alleged interference with an owner's right to exclude which troubled the Ninth Circuit. Review and guidance by this Court is required to resolve all these questions.

III.

REVIEW IS REQUIRED TO CLARIFY THE APPLICABILITY OF THE RIPENESS DOCTRINE TO RENT REGULATION.

The opinion places considerable importance on the allegation that mobilehome owners sell their mobilehomes at a premium, noting that this is a significant difference from the effect of previously upheld rent control ordinances:

> "In none of the cited cases has the landlord claimed that the tenant's right to possess the property at reduced rental rates was transferable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others.
>
> "This is not a minor difference; it is crucial."

(Opinion, 813 F.2d at 205-206, App. C-14.)

The basis for the allegation that tenants are able to sell the right to possess property at a reduced rental rate is the further allegation that their mobilehomes sell for more than they would absent the Santa Barbara ordinance. If the plaintiffs had sought a rent increase above the automatic 10% increase provided when a tenant sells a mobilehome and moves out (Santa Barbara ordinance § 26.08.040(c)(3)), the alleged premium, if any, might disappear. Thus, it is impossible to determine the impact of the ordinance on the plaintiffs until they have sought and obtained or been denied a rent increase.

This Court has repeatedly held that a taking claim cannot be ripe under these circumstances. *MacDonald, Somer & Frates,* 106 S.Ct. at 2567-2569; *Williamson County Regional Planning Commission:*

> "Although [t]he question of what constitutes a 'taking' for the purposes of the Fifth Amendment has proved to be a problem of considerable difficulty, this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. *Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position* regarding how it will apply the regulations at issue to the particular land in question."

437 U.S. at 190-191 (emphasis added, citations omitted).

The opinion's rejection of Santa Barbara's claim that the complaint is not ripe therefore requires review to clarify the proper application of the ripeness doctrine to rent control cases.[7]

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[7]A ripeness issue involving rent control in a somewhat different context is raised in Pennel v. City of San Jose, Case No. 86-753, now pending before the Court. Although the final opinion in Pennel can be expected to shed some light on the ripeness issue, it may not clarify the issues raised by the opinion herein. In any case, it is essential that the opinion herein be reviewed to prevent any conflict with this Court's ultimate decision in Pennel.

IV.

REVIEW IS REQUIRED TO RESOLVE CONFLICTS BETWEEN THE OPINION HEREIN AND THE OPINIONS OF THIS COURT, OTHER CIRCUITS AND STATE SUPREME COURTS.

As set forth above, the opinion herein conflicts with this Court's opinions in *Florida Power Corp., Fresh Pond* and *Fisher,* the Third Circuit's opinion in *Troy, Ltd.,* the California Supreme Court's opinions in *Carson Mobilehome Park Owners Association, Fisher* and *Birkenfeld,* the Massachusetts Supreme Court's opinion in *Grace v. City of Brookline,* and the New Jersey Supreme Court's opinion in *Hutton Park Gardens.* Review is needed to resolve these conflicts.

CONCLUSION

Amici urge that the Petition be granted for all the foregoing reasons.

Dated: August 31, 1987

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On September 3, 1987, I served the within Amicus Curiae Brief in re: "City of Santa Barbara vs. Williams C. Hall and Jean G. Hall" in the United States Supreme Court, October Term 1987, No. 87-220;

On the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on September 3, 1987, at Los Angeles, California

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No. 87-220

In The
Supreme Court of the United States
October Term, 1987

CITY OF SANTA BARBARA,

Petitioner,

vs.

WILLIAMS C. HALL and JEAN G. HALL,

Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

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LIST OF PARTIES

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

Page

LIST OF PARTIES i

HISTORY AND JURISDICTION 1

PRELIMINARY STATEMENT:

1. Since Rent Control, Of Necessity, Involves the Forced Transfer Of An Estate In Land From The Landlord To The Tenant, It Is Justified, If At All, Only In The Case Of An Emergency 1

2. A Municipal Ordinance, Which Encroaches On The Fifth Amendment, Is Not Presumptively Valid 1

STATEMENT OF THE CASE 2

LEGAL ARGUMENTS

I. THE LEGISLATION CONSTITUTES AT THE LEAST A FORCED TRANSFER OF A LIFE ESTATE, AT THE OPTION OF THE TENANT, FROM THE LANDLORD TO THE TENANT. 4

II. IT IS WHAT IS TAKEN FROM THE LANDLORD WHICH DETERMINES WHETHER A TAKING HAS OCCURRED. 6

III. THE LEGISLATIVE DECLARATION OF NEED OR EMERGENCY IS SUBJECT TO JUDICIAL SCRUTINY. 6

IV. THE LEGISLATION CONSTITUTES A TAKING. 6

A. General Discussion Re: The Law of Taking 7

B. Elements of Taking 12

1. The Legislation Amounts to A Transfer of An Estate In Land 12

TABLE OF CONTENTS—Continued

Page

2. The Plaintiffs Have Been Permanently Deprived Of Possession Of Their Spaces For The Life Of The Present Occupant, And, Further, Plaintiffs Are Forced To Create Another Life Estate For The Benefit Of Subsequent Tenants So Long As The Property Is Used For Residential Purposes. 13

V. THE FORCED TRANSFER OF THE LIFE ESTATE FROM THE LANDLORD TO THE TENANT WITHOUT JUST COMPENSATION VIOLATES THE FIFTH AMENDMENT. 14

A. "Just Compensation" Is The Exact Monetary Equivalent Of The Property Taken, And "Fair Return" It Not Synonymous With Just Compensation. 14

B. That Plaintiffs Enjoy The Right To Receive Severely Restricted Rents Is Irrelevant To The Taking Issue. 16

VI. RENT CONTROL CAN ONLY BE JUSTIFIED WITHIN AN "EMERGENCY" CONTEXT. 18

A. The Supreme Court Has Always Required That Rent Control Measures Be Temporary And Designed To Meet The Exigencies Created By An Emergency In The Nature Of War Or Other Catastrophe. 18

B. The Emergency Which Justifies The Imposition Of Rent Controls Is In The Nature Of War Or Other Natural Catastrophe—An Emergency Cannot Be Predicated On The Mere Existence Of Inflation Or A Shortage Of Mobile Homes. 20

TABLE OF CONTENTS—Continued

Page

C. An Essential Corollary To The Requirement Of An Emergency Is That Emergencies End And So Should Controls. 22

VII. THE NATIONAL SIGNIFICANCE OF THE OPINION BELOW JUSTIFIES THIS COURT'S INTERVENTION AT THIS STAGE OF THE LITIGATION. 22

VIII. THE FORCED CREATION OF SEVENTY-ONE LIFE ESTATES, WHEREIN THE TENANTS CAN RESIDE ON THE PREMISES FOR SO LONG AS THE PROPERTY IS USED FOR RENTAL PURPOSES, CONSTITUTES A PHYSICAL OCCUPATION. 23

IX. SHOULD THE RESPONDENT EXHAUST ADMINISTRATIVE REMEDIES? WILL THE RENT CONTROL BOARD DECLARE ITSELF A LEGAL CIPHER AND VOTE ITSELF OUT OF EXISTENCE? 24

CONCLUSION 24

CITATIONS

CASES:

Page

Agins v. Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) 11

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978) 7

Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed.2d 1 (1973) 15

Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865 (1921) 10, 11, 18, 19

Branson v. Bush, 251 U.S. 182, 40 S.Ct. 113, 65 L. Ed. 215 (1919) 13

Charles Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103 (1923) 14

Chastleton Corp. v. Sinclair, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841 (1924) 18, 19, 20

Chicago, B & Q Railway Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897) 13

City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (1972) 21

City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764 (Florida 1975) 20

Cotati Alliance for Better Housing v. City of Cotati, 148 Cal.App.3d 280, 195 Cal. Rptr. 825 (1983) 15

Davis v. Los Angeles County, 12 Cal.2d 412, 84 P. 2d 1034 (1938) 1

Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed. 2d 15 (1963) 10

CITATIONS—Continued

Page

Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 42 S.Ct. 289, 66 L.Ed. 595 (1922) 18

Federal Power Commission v. Hope National Gas Co., 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944) 16

Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. — (1942) 16

Goldblatt v. Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) 11, 12

Haines Estate, 150 Cal. 640, 89 P. 606 (1907) 4

Jeffers v. Easton Eldridge Co., 113 Cal. 345, 45 P. 680 (1896) 4

Loeterman v. Town of Brookline, 524 F. Supp. 1325 (D. Mass. 1982) 5

Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877 (1921) 11, 18, 19

Missouri ex rel Southwestern Bell Telephone Co. v. Public Service Commission, 262 U.S. 276, 43 S.Ct. 544, 67 L.Ed. 981 (1923) (separate opinion by Brandeis) 16

Mora v. Majias, 223 F.2d 814 (1st Cir. 1955) 14

Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) 7

Munn v. Illinois, 94 U.S. 113 14

Nollan v. California Coastal Commission, 483 U.S. —, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) 2, 8, 23

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) 11

CITATIONS—Continued

	Page
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321 (1922)	11
Reinhardt Estate, 74 Cal. 365, 16 P. 13 (1887)	4
San Christina Investment Co. v. City and County of San Francisco, 167 Cal. 762, 141 P. 384 (1914)	1
Scaccia v. Old Forge Borough, 373 Pa. 161, 94 A. 2d 563 (1953)	21
Smithe Estate, 132 Cal. App. 2d 343, 282 P.2d 141 (1955)	4
State v. Klein, 63 N.D. 514, 249 N.W. 118 (1933)	19
Taylor v. McCowan, 154 Cal. 798, 99 P. 351 (1908)	4
Telegraph Avenue Corp. v. Raentich, 205 Cal. 93, 269 P. 1109, 61 A.L.R. 306 (1928)	4
United States v. Carolene Products Co., 304 U.S. 154, 58 S.Ct. 778, 82 L.Ed. 1234 (1938)	1, 6
United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946)	12
United States v. Cress, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746 (1917)	12
United States v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed.2d 1789 (1947)	10
United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311, 156 A.L.R. 390 (1945)	6, 13
Warren v. City of Philadelphia, 387 Pa. 362, 127 A.2d 703 (1956)	20
Wilson v. New, 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755 (1917)	18

CITATIONS—Continued

Page

Woods v. Cloyd W. Miller Co., 333 U.S. 138, 68 S.Ct. 421, 92 L.Ed. 596 (1948) 20

STATUTES:

California Civil Code § 761 5

TREATISES:

The Federalist #10, at 104-109 (J. Madison) (Hamilton edition 1868) 9

2 Nichols on Eminent Domain (3d Rev. Ed. 1975) (Taking and Damage, § 6.3, p.65) 12

The Records of the Federal Convention of 1787 (M. Farrand ed. 1911) 10

Restatement of Property, § 19 (1936) 5

HISTORY AND JURISDICTION

Responding party agrees with the jurisdictional statement and history of the case.

PRELIMINARY STATEMENT

1. Since Rent Control, Of Necessity, Involves the Forced Transfer Of An Estate In Land From The Landlord To The Tenant, It Is Justified, If At All, Only In The Case Of An Emergency:

Rent control, in the present context, is unlike other forms of economic regulation. Of necessity, it entails the granting of an estate (in this case for life) in the land of the landlord. Regulating the price of a bottle of milk does not give the purchaser an estate in the land or buildings of the bottling company.

2. A Municipal Ordinance, Which Encroaches On The Fifth Amendment, Is Not Presumptively Valid:

Enactments of city councils and other local bodies have been repeatedly held not to carry any presumption that their factual determinations are correct. *San Christina Investment Co. v. City and County of San Francisco,* 167 Cal. 762, 770, 141 P.384 (1914); *Davis v. Los Angeles County,* 12 Cal.2d 412, 84 P.2d 1034 (1938).

This court has long recognized there is a narrower scope for the operation of the presumption of constitutionality where specific constitutional provision limits legislative power distinguished from the general due process requirements. *United States v. Carolene Products Co.,* 304 U.S. 154, 152, note 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938).

This court in *Nollan v. California Coastal Commission,* 483 U.S. —, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), mandates a heightened level of judicial scrutiny where the government compels an "actual conveyance of property."

As will be explained in detail below, the legislation in question involves a forced transfer of 71 life estates from the landlord to the tenants.

—o—

STATEMENT OF THE CASE

Plaintiffs are residents of the City of Santa Barbara, a public entity located in the County of Santa Barbara, State of California. Plaintiffs are the owners of the Los Amigos Mobile Home Estates within the City of Santa Barbara which are rented for residential purposes.

On or about August 14, 1984, the City of Santa Barbara adopted an ordinance, a copy of which was attached to the complaint, marked Exhibit "A", and by reference thereto fully incorporated therein.

The complaint alleges that said ordinance has had the following effects:

a. The plaintiffs have been divested of their property rights in said real property to the extent that the tenants of mobile homes presently in their park, as well as their successors in interest, now have what amounts to a defeasible fee interest in the land upon which the mobile

home park is located, and the plaintiffs have at best a possibility of reverter with the obligation to administer the property for the benefit of said tenants.

b. The tenants of said mobile home park have received a windfall in that the City of Santa Barbara, acting pursuant to the ordinance hereinbefore described, effectuated a transfer of wealth from landlords to tenants including plaintiffs herein, without just compensation.

Plaintiffs are prepared to prove at the time of trial that mobile home units in plaintiffs' mobile home park are selling for up to ten times their bluebook value. That increase in numerous cases of approximately 900% in value represents the value of the estate forcibly transferred from landlord to tenant.

While defendants are in error in their contention that only two factual allegations are contained in the complaint, in many instances, including this one, only one or two factual allegations would be necessary to establish the existence of a cause of action. For example, if the City of Santa Barbara passed a law prohibiting Hispanics from using public accommodations, one would simply have to make the factual allegation that he is Hispanic in order to effectively challenge the constitutionality of the enactment.

This is an enactment against a status, i.e., the status of owner of a mobile home park. Once the status is established, the law operates inexorably to charge the fee interest of the owner with life estates transferable for value by the tenant. It is precisely this loss which is at issue in this litigation.

LEGAL ARGUMENT

I.

THE LEGISLATION CONSTITUTES AT THE LEAST A FORCED TRANSFER OF A LIFE ESTATE, AT THE OPTION OF THE TENANT, FROM THE LANDLORD TO THE TENANT.

The *Restatement of Real Property* defines a life estate as:

> "(b) . . . an estate which cannot last longer than the lives of one or more human beings, and is not terminable at any fixed or computable period of time or at the will of the conveyor."

The essence of a life estate is that it *may* last for life, not that it must last for life. *Reinhardt Estate,* 74 Cal. 365, 16 P. 13 (1887); *Taylor v. McCowan,* 154 Cal. 798, 99 P. 351 (1908).

A life estate is regarded *in the law* as superior to a leasehold, which is a chattel real, even if the term of a valid leasehold could be for a thousand years. *Jeffers v. Easton Eldridge Co.,* 113 Cal. 345, 45 P. 680 (1896); *Telegraph Avenue Corp. v. Raentich,* 205 Cal. 93, 269 P. 1109, 61 A.L.R. 306 (1928).

No particular language is required to create a life estate, *Smithe Estate,* 132 Cal. App. 2d 343, 282 P.2d 141 (1955), an estate for life can result from deed, will or from "a set of circumstances to which the law attributes this result." *2 Powell on Real Property,* page 88.

A life estate may be granted subject to a charge binding upon the life tenant to pay specified sums to others. *Haines Estate,* 150 Cal. 640, 89 P. 606 (1907).

Any one of us in law school would have recognized immediately, that the expansion of the right of a month-to-month tenant to occupy the premises for life constituted the transfer of an important interest in land to that tenant. It is only because of the prevailing dogma of the day that any other analysis could be seriously proffered or entertained.

There are only four classes of estates in land: (1) inheritable or perpetual estates; (2) life estates; (3) estates for years, and (4) estates at will. California Civil Code § 761.

By a mere process of elimination only a life estate remains.

An estate for years, which is the only conceivable alternative, is one: "the duration of which is fixed in units of a year, or multiples or divisons thereof." *Restatement of Property,* § 19 (1936).

There is no such limitation, or measuring period which now exists with respect to the occupancy of the tenants of plaintiff's mobile home park. The only conclusion that can be reached is that, at least, a life estate has been transferred to the tenants.

(A technically more correct analysis is that a statutory defeasible fee interest has been created on behalf of tenants as a group.)

In *Loeterman v. Town of Brookline,* 524 F. Supp. 1325 (D. Mass. 1982), (a rent control case) the court described a Massachusetts town's ban on evictions and recovery of possession, stating:

"The tenant has the equivalent of a life tenancy in the property."

II.

IT IS WHAT IS TAKEN FROM THE LANDLORD WHICH DETERMINES WHETHER A TAKING HAS OCCURRED.

The effect of the legislation is to execute the following conveyance:

"Landlord to Tenant A for life with a power of appointment to Tenant B for life so long as the property is used for residential purposes."

This legislation constitutes a taking of a defeasible fee interest from the landlord, which fee interest is to be used for the benefit of the existing tenant and subsequent tenants.

The United States Supreme Court has held that the deprivation of the owner rather than the accretion of a right or interest by the sovereign constitutes the taking. *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311, 156 A.L.R. 390 (1945).

III.

THE LEGISLATIVE DECLARATION OF NEED OR EMERGENCY IS SUBJECT TO JUDICIAL SCRUTINY.

The Supreme Court has long recognized that there is a narrower scope for the operation of the presumption of constitutionality where a specific constitutional provision limits legislative power as distinguished from the general due process requirements. *United States v. Carolene Products Co., supra.*

What is at stake in the instant case is the fundamental right of a citizen to secure ownership of his private property, a right specifically protected by the Fifth Amendment's "public use" limitation. The amendment does not merely regulate the use of private property; it seeks to *appropriate title* to private property. When legislation infringes so fundamental a right, " . . . the usual judicial deference to the legislature is inappropriate." *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 499, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). See also, *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978).

IV.

THE LEGISLATION CONSTITUTES A TAKING.

"If you rent it, you get to keep it, and then sell it."

A. General Discussion Re: The Law of Taking.

It should be parenthetically noted that the court below properly noted that an inadvertent taking is subject to higher scrutiny than a deliberate taking for the obvious reason that different powers are involved, i.e. the police power versus the power of eminant domain. Santa Barbara has not even begun to suggest that it has ever considered paying the respondent for the life estates which this legislation, of necessity, takes from the landlord and gives to the tenants.

The legislation transfers all of the significant value in each mobile home space to the tenants, vests the use of the space in said tenants and their successors, and permanently deprives the plaintiffs of possession of their property.

This legislation and its ensuing scenario are not to be confused with legislating the price of a bottle of milk. The milk purchaser does not get an estate in the milk bottling plant.

Under the guise of regulation a "taking" has occurred with the following pernicious results:

1. The tenant has shortcut the American way of buying and paying for his estate, without the necessity of bothersome details like downpayments, qualifying for financing, making monthly payments, paying taxes and providing upkeep and care;

2. The tenant presently in possession has forever raised the rent on the space by pocketing the windfall when he goes on his way.

For example, when a tenant has sold his mobile home for $50,000.00 in excess of its bluebook value, at today's interest costs, he has added in excess of $500.00 per month to the cost of occupying the space that itself may only rent for $200.00—a 250% increase in effective rent and a perfect example of social Hegelian dialetics, i.e. you often achieve through legislation the precise opposite of your stated goal. It should be noted that while the court invited a closer look at the "rationality of rent control," it was in the footnote and the court in fact did not do it. However, if ever a case called for an examination of the underlying rationale justifying the imposition of the enactment upon the landlord, this one does for the reasons stated above, i.e. the legislation has precisely the opposite effect from its declared purpose. Precisely this kind of analysis was the underlying theme of the court in *Nollan v. California Coastal Commission, supra.* The court examined "the end

advanced as the justification for the prohibition," and concluded:

> " . . . The lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than it was . . . 'an out and out plan of extortion.' " — U.S. —, 107 S.Ct. at 3148.

3. The landlord who nominally owns the land receives no part of the $500.00 increase in effective rent, has all of the burdens of continued maintenance, taxes and upkeep, and possesses the land subject to the charge of a life estate or defeasible fee depending on one's analysis.

4. This legislation is nothing more than expropriation, in favor of the tenants and operating against the landlord. It owes its existence to the plain and simple fact that there are more mobile home park renters than there are mobile home park owners. The danger of this form of majoritarian tyranny was addressed by our founding fathers, and the Constitution was created to protect the minority from the excesses of the majority.

> " . . . when a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens . . . . " *The Federalist # 10,* at 104-109 (J. Madison) (Hamilton edition 1868).

Madison stated his concern eloquently at the constitutional convention.

> "In future times a great majority of the people will not only be without landed, but any other sort of, property. These [may] . . . combine under the influence of their common situation, in which case the

> rights of property & the public liberty, [will not be secure in their hands] . . . . " The Records of the Federal Convention of 1787, 203-04 (M. Farrand, ed. 1911) (footnotes omitted)

It requires no strain on the imagination to construct the proposition: if this type of legislation is permitted to stand, then no one is safe from expropriation of their property interest by an act of the government. It was to prevent such execesses that the Fifth Amendment was drafted and enacted.

The Fifth Amendment prevents taking for public use without just compensation, and further prohibits the taking, even with compensation, *for private purposes.*

Nothing is clearer in our jurisprudence than that the legislature cannot carve out of existing estates, new estates, *in invitum.* It cannot confer on a tenant an equitable lien or charge against the owner's title, to take effect on expiration of the tenancy. That is confiscation pure and simple. It creates the astounding doctrine that once a tenant, forever a tenant.

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private persons, a servitude has been acquired." *United States v. Dickinson,* 331 U.S. 745, 748, 67 S.Ct. 1382, 91 L.Ed.2d 1789 (1947). See also *Dugan v. Rank,* 372 U.S. 609, 625, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963).

Justice Holmes in *Block v. Hirsh,* 256 U.S. 135, 156, 41 S.Ct. 458, 65 L.Ed. 865 (1921) stated:

> " . . . It may be conceded that *regulations of the present sort (rent control) pressed to a certain height might amount to taking* without due process of law." 256 U.S. at 156. (emphasis added)

Justice Holmes in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415-416, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321 (1922) wrote:

> "The general rule at least is, that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking . . . a strong public desire to improve the public condition is not enough to warrant achieving a desire by a shorter cut than the constitutional way of paying for the change . . . "

Justice Holmes also noted that the rent control laws such as those in *Block v. Hirsh, supra,* and *Marcus Brown Holding Co. v. Feldman,* 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877 (1921) "went to the verge of the law" but fell short of being a taking because of the existence of an emergency. 260 U.S. at 416.

The court in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 127, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) stated:

> "It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial *public* purpose (citation omitted), or perhaps if it has an unduly harsh impact upon the owner's use of the property . . . " (emphasis added)

In *Agins v. Tiburon,* (1980) 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), the U.S. Supreme Court affirmed the California decision holding that although the ordinances limit development, "they neither prevent the best use of appellant's land . . . *nor extinguish a fundamental attribute of ownership. . . .*"

As is evident in the Santa Barbara legislation the owner has lost the right to use the property, to possess

the property, to transfer the property to a buyer of his choice, or to in any way recover possession of the property. Fundamental rights of ownership have been extinguished.

A taking does not become a non-compensable exercise of police power simply because the government in its grace allows the owner some remaining attribute of ownership. "It is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *United States v. Cress,* 243 U.S. 316, 328, 37 S.Ct. 380, 61 L.Ed. 746 (1917); *United States v. Causby,* 328 U.S. 256, 266, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946). See also *Goldblatt v. Hempstead,* 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962).

> "The modern prevailing view is that any substantial interference with private property which destroys or lessens its value is, in fact and in law, a 'taking' in a constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed." *2 Nichols on Eminent Domain* (3rd Rev. Ed. 1975) (Taking and Damage, § 6.3, p.65)

B. Elements of Taking:

The legislation in question amounts to a forced grant of a life estate to the tenant presently in possession as well as a forced grant of the remainder to the tenants' successors so long as the plaintiffs utilize their property for residential rental purposes.

1. The Legislation Amounts To A Transfer of An Estate In Land.

For the reasons set forth above the ordinance amounts to a transfer of life estate, at the option of the tenants, at the very least. A correct analysis also recognizes that the remainder interest in the property will vest in subsequent tenants so long as the property is used for residential rental purposes, and that the plaintiff possesses at best a possibility of reverter if the property should cease to be used for residential rental purposes.

2. The Plaintiffs Have Been Permanently Deprived Of Possession Of Their Spaces For The Life Of The Present Occupant, And, Further, Plaintiffs Are Forced To Create Another Life Estate For The Benefit Of Subsequent Tenants So Long As The Property Is Used For Residential Purposes.

The protection of private property rights guaranteed by the Fifth Amendment does not refer to:

> "Vulgar and untechnical senses of the physical thing with respect to which a citizen exercises rights recognized by law . . . (instead it) denote(s) the group of rights inherent in the citizen's relation to the physical thing, it is the right to possess, use and dispose of it . . . the constitutional provision is addressed to every sort of interest the citizens may possess." *United States v. General Motors Corp., supra,* at 377-378.

There can be no conception of property aside from its control and use, and upon its use depends its value. *Branson v. Bush,* 251 U.S. 182, 187, 40 S.Ct. 113, 64 L.Ed. 215 (1919). Protection of property has been regarded as a vital principle of republican institutions. It is next in degree to the protection of personal liberty and freedom from undue interference or molestation. *Chicago, B & Q Railway Co. v. Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

The Santa Barbara legislation has destroyed valuable property rights and has resulted in a legal dispossession of the owner. The compulsion placed upon plaintiffs to enter into a lease for a life estate is itself proscribed by the U.S. Supreme Court. See *Munn v. Illinois,* 94 U.S. 113, 127, 133.

The fictitious character of the argument that the landlord may be free to leave the business has long been recognized. See *Charles Wolff Packing Co. v. Court of Industrial Relations,* 262 U.S. 522, 543, 43 S.Ct. 630, 67 L.Ed. 1103 (1923); *Mora v. Majiss,* 223 F.2d 814 (1st Cir. 1955).

The only compensation the landlord receives for the unconditional surrender of every significant right of ownership is the present value of an inadequate income stream which is accompanied by a *permanent charge* upon the property.

If this legislation does not constitute a taking—the word "taking" should be stricken from the dictionary.

V.

THE FORCED TRANSFER OF THE LIFE ESTATE FROM THE LANDLORD TO THE TENANT WITHOUT JUST COMPENSATION VIOLATES THE FIFTH AMENDMENT.

A. "Just Compensation" Is The Exact, Monetary Equivalent Of The Property Taken, And "Fair Return" Is Not Synonymous With Just Compensation.

"Just compensation" has been determined by the Supreme Court to mean the full monetary equivalent of the property taken and the owner is to be put in the same position monetarily as he would have occupied if this prop-

erty had not been taken. *Almota Farmers Elevator & Warehouse Co. v. United States,* 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed.2d 1 (1973).

Under ruling California case law the difference between "fair return" and "just compensation" is the difference between "lightning" and "lightning bug."

The test of "just compensation" is a far cry from "fair return" recently approved by the California Appellate Court in *Cotati Alliance for Better Housing v. City of Cotati,* 148 Cal.App.3d 280, 195 Cal. Rptr. 825 (1983), wherein the Supreme Court refused a petition for hearing, and the Appellate Court held that the return to which the landlord was entitled was in essence the original investment of the landlord adjusted for such factors as capital improvement.

The ultimate tests employed, i.e., "just compensation" or "fair return" are dramatically different, and reflect a difference in the source of the rights at issue.

This is not a simple price regulation case. It involves, at the very least, the forced creation and charge upon plaintiffs' property of seventy-one life estates (perhaps defeasible fees) for the benefit and use of private persons. The "fair return" concept has nothing to do with an examination of whether this forced transfer of seventy-one life estates in plaintiff's land constitutes a taking.

Plaintiffs concede that the test of "fair return" (simply the opposite side of the coin of the concept of confiscatory legislation) is an element which must be satisfied under the Fourteenth Amendment due process provision when examining an exercise of police power by the

municipality. The Supreme Court in *Missouri ex rel Southwestern Bell Telephone Co. v. Public Service Commission,* 262 U.S. 276, 290, 43 S.Ct. 544, 67 L.Ed. 981 (1923) (separate opinion by Brandeis) held that the capital invested by a utility was entitled to a "fair return" when controlled by a regulatory agency through the exercise of the police power of the state. It is equally true that if the police power is exercised without providing for a fair return so that the owner of the property experiences confiscatory results the legislation is then unconstitutional under the due process clause of the Fourteenth or Fifteenth Amendments. *Federal Power Commission v. Natural Gas Pipeline Co.* (1942), 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. —; *Federal Power Commission v. Hope National Gas Co.* (1944), 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944).

It is also true that while price regulation alone may be constitutionally permissible if a "fair return" is provided for, if such regulation goes too far, if it compels a transfer of an interest in land, if it interferes with the owner's possession, use or exploitation of the property, it can be a "taking" under the Fifth Amendment which is either absolutely prohibited if it involves a transfer from one private person to another, or in the alternative if it is deemed for a public purpose just compensation must be paid.

B. That Plaintiffs Enjoy The Right To Receive Severely Restricted Rents Is Irrelevant To The Taking Issue.

The notion that plaintiffs are somehow compensated for compelled transfer of seventy-one life estates by ren-

tal payments that they received is an outright sham. The amounts received for a "taking for private purposes" if relevant do not even begin to approach what would be the payments on the purchase of the land under the mobile homes.

It must be recognized that plaintiffs are essentially receiving exactly the same rent that they received prior to the creation of the statutory life estate. Thus, they have received no compensation for the transformation of the month-to-month tenancy into a life estate.

While plaintiffs recognize that given the political bent of the city fathers in Santa Barbara they would prefer that the tenants pay nothing for a life estate, the crucial inquiry related to value, if indeed it were a relevant consideration, would focus on questions relating to the economic worth of the right transferred, i.e., in many cases the market has demonstrated that the right transferred was worth at least $50,000.00. Plaintiffs have received not one cent—while single tenants have enjoyed a windfall in excess of $50,000.00 for the rights transferred.

It is a forced transfer of a feast at famine prices.

Obviously, under the circumstances the transfer of a right which has resulted in a monetary benefit to the tenant in excess of $50,000.00 for which the landlord has received nothing does not by any stretch of the imagination constitute "just compensation" or the full monetary equivalent required by the Fifth Amendment as interpreted by the United States Supreme Court.

VI.

RENT CONTROL CAN ONLY BE JUSTIFIED WITHIN AN "EMERGENCY" CONTEXT.

" . . . They [rent control laws] went to the verge of the law . . ." (Justice Holmes, 260 U.S. 393, 416).

A. The Supreme Court Has Always Required That Rent Control Measures Be Temporary And Designed To Meet The Exigencies Created By An Emergency In The Nature Of War Or Other Catastrophe.

Every Supreme Court case that has ever decided the validity of rent control regulation has done so within an emergency context. See *Block v. Hirsh, supra; Marcus Brown Holding Co. v. Feldman, supra; Edgar A. Levy Leasing Co. v. Siegel,* 258 U.S. 242, 42 S.Ct. 289, 66 L.Ed. 595 (1922); *Chastleton Corp. v. Sinclair,* 264 U.S. 543, 547-548, 44 S.Ct. 405, 68 L.Ed. 841 (1924).

In finding that an emergency existed in *Block v. Hirsh, supra,* Justice Holmes was able to fit rent control within the reach of *Wilson v. New,* 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755 (1917).

In *Edgar A. Levy Leasing Co., supra* at 245-247, Justice Holmes specifically referred to the emergency, and did not rely on the beliefs of the legislators regarding the existence of the emergency, but buttressed his findings on the housing emergency by pointedly noting that the committees appointed by the governor and the legislature had thoroughly investigated and documented the housing crisis arising out of the war.

The court in *Chastleton* emphasized the need for the emergency requirement otherwise there would have been no reason to remand ". . . to inquire whether the *exigency*

still existed upon which the continued operation of the law depended." *Chastleton Corp. v. Sinclair, supra* at 548.

Justice Holmes in writing the opinion of the court in *Chastleton* stated:

> "We repeat what was stated in *Block v. Hirsh* (cite omitted) as to the respect due to a declaration of this kind of the legislature . . . but even as to them a court is not at liberty *to shut its eyes to an obvious mistake,* when the validity of the law depends upon the truth of what is declared . . . a law depending upon the existence of an emergency or other certain state of facts to uphold it they cease to operate if the emergency ceases or the facts change . . ." 264 U.S. at 547 (emphasis added)

Justice Holmes in characterizing the argument advanced by the defendant stated:

> ". . . The first and most important is the *emergency* that justified interference with ordinary existing private rights in 1919 had come to an end in 1922. . ." 264 U.S. at 546. (emphasis added)

In speaking of rent control provisions upheld in *Block, Marcus Brown* and *Levy,* the court in *State v. Klein,* 63 N.D. 514, 527, 249 N.W. 118 (1933) stated:

> "These measures were held justified *because* of the great national *emergency* caused by the world war; but even then four of the nine members of the court considered the law absolutely unconstitutional, regardless of the safeguards enacted for the protection of the owner." (emphasis added)

The Supreme Court has never overruled the emergency requirement set forth in the above cases. Precisely the contrary is true. After *Nebbia v. New York,* 291 U.S. 501 (1934) and during the period of World War II, emer-

gency housing conditions again compelled resort to rent controls with the federal government imposing them itself.

The Supreme Court after World War II relied on the existence of an emergency, and never reconsidered the constitutionality of rent controls independent of a wartime emergency. In *Woods v. Cloyd W. Miller Co.* (1948) 333 U.S. 138, 141, 68 S.Ct. 421, 92 L.Ed. 596 (1948), the court said:

> ". . . The war power includes the power 'to remedy the evils which have arisen from its rise in progress' and continue for the *duration of the emergency.*" 333 U.S. at 141. (emphasis added)

B. The Emergency Which Justifies The Imposition Of Rent Controls Is In The Nature Of War Or Other Natural Catastrophe—An Emergency Cannot Be Predicted On The Mere Existence Of Inflation Or An Ability On The Part Of The Tenant Population To Meet Rental Payments.

In *Chastleton Corp. v. Sinclair, supra,* the court ruled on an act creating rent control for the District of Columbia and stated:

> "If about all that remains of war conditions is the increased cost of living, that itself is not a justification of the act." 264 U.S. at 548.

In the case of *City of Miami Beach v. Forte Towers, Inc.* 305 So.2d 764 (Florida 1975) at 804, the court declared that an inflationary spiral was not an emergency sufficient to justify rent controls.

In *Warren v. City of Philadelphia,* 387 Pa. 362, 127 A.2d 703 (1956), the court defined emergency as:

> " 'A sudden or unexpected event which creates a temporarily dangerous condition used in necessitating immediate or quick action * * *' and that '* * * Ordinary conditions or customarily existing conditions are not emergencies * * *' " Quoting *Scaccia v. Old Forge Borough,* 373 Pa. 161, 94 A.2d 563 (1953).

In *City of Miami Beach v. Fleetwood Hotel, Inc.* (1972) 261 So.2d 801 at 804 the court stated:

> "In the area of rent control legislation in general, the Supreme Court of the United States has placed severe limitations on the power of the state government in the area of rent control. When such legislation is enacted, deprivation of rights under the Fifth and Fourteenth Amendments to the Constitution of the United States, and freedom to contract are at stake. The only justification for the utilization of such legislation found by the U.S. Supreme Court *is an emergency.* (citation omitted) Emergency has been narrowly defined. *An increase in the cost of living (an inflationary spiral) alone is not sufficient for rent control legislation. . .*" (emphasis added)

The Santa Barbara ordinance was enacted as a response to the loss of low and moderate income housing and scarcity of mobile home spaces (largely a function of regulation by the same municipality, *See,* Comment, Mobile Home Parks and Connecticut's Regulatory Scheme, a Takings Analysis, 17 Conn.L.Rev. 811 (1985).) Further, mobile home parks represent only a small fraction of the housing in Santa Barbara (all of which housing is subject to the same economic pressures) yet mobile home parks are the only part of the housing market subjected to rent controls. This circumstance applies to most of the cities who joined in the amicus brief filed herein.

Despite the existence of these same pressures nationwide, only a few jurisdictions, California being the leading example, have decided in their legislative wisdom to enact rent controls. Obviously, the balance of the country does not believe that a sufficient "emergency" exists to justify the radical solution of rent control.

This Santa Barbara ordinance cannot withstand analysis under an "emergency requirement" and should be held to be unconstitutional.

C. An Essential Corollary To The Requirement Of An Emergency Is That Emergencies End And So Should Controls.

For the Respondents, a necessary corollary of the requirement of the emergency for the imposition of controls is the expectation that the emergency will someday end. Santa Barbara's ordinance holds out no such hope. It is unlikely that substantial new mobile home parks will be built in Santa Barbara so that the "shortage" will end. Over time, most of the mobile home coaches will be sold by their present owners. New coach owners will have paid the old coach owners for the value of the rent controlled space as a part of the purchase price of the coach. Uultimately, the Respondents, or their children, will sell the mobile home park at the depressed economic value that the rent controls inherently cause while their former tenants enjoy the fruits of the Halls' thrift, labor and risk.

VII.

THE NATIONAL SIGNIFICANCE OF THE OPINION BELOW JUSTIFIES THIS COURT'S INTERVENTION AT THIS STAGE OF THE LITIGATION.

Respondent agrees with petitioner's contention on this point.

VIII.

THE FORCED CREATION OF SEVENTY-ONE LIFE ESTATES, WHEREIN THE TENANTS CAN RESIDE ON THE PREMISES FOR SO LONG AS THE PROPERTY IS USED FOR RENTAL PURPOSES, CONSTITUTES A PHYSICAL OCCUPATION.

The only reason that the City can even begin to advance the argument that we are not confronting the "physical occupation," is because so much of our jurisprudence has been blinded by the dogma of the day. The *Nollan* court was precisely on point when it stated:

> "We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude (others is) one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " — U.S. at —, 107 S.Ct. at 3145.

Respondent has lost that right with respect to seventy-one tenants. The only cases cited by petitioner are Supreme Court cases decided in an emergency context, and, for the reasons described in detail above, they are not controlling authority.

IX.

SHOULD THE RESPONDENT EXHAUST ADMINISTRATIVE REMEDIES?

Petitioner misapprehends the relief being sought by respondent. We are not seeking a rent increase. We are seeking an invalidation of the law and damages for the temporary taking. In the alternative, let the City act under its power of eminent domain and pay respondent just compensation.

Any remedy which could be obtained under the terms of the Santa Barbara Ordinance is irrelevant to any issue in this case.

CONCLUSION

If the court decides to grant the petition for the writ, then the decision of the court below should be upheld, and, further, the imposition of rent control, absent an emergency, should be declared unconstitutional.

Respectfully submitted,

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